

Part 3
NO-FAULT MOTOR VEHICLE INSURANCE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMERCE AND FINANCE

OF THE

COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

FIRST SESSION

ON

H. Con. Res. 241

**EXPRESSING THE SENSE OF CONGRESS WITH RESPECT TO
MOTOR VEHICLE INSURANCE AND AN ACCIDENT
COMPENSATION SYSTEM**

H.R. 4994, H.R. 6528, H.R. 4995, H.R. 7514

H.R. 3968 (and identical bills),

and H.R. 3970 (and identical bills)

BILLS RELATING TO NO-FAULT MOTOR VEHICLE INSURANCE

APRIL 20, 21, 22, 26, 27, 28, 29, AND 30, 1971

Serial No. 92-27

Printed for the use of the
Committee on Interstate and Foreign Commerce



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CONTENTS

(The same table of contents appears in parts 1, 2, 3, and 4)

PART 1		
Hearings held on—		Page
April 20, 1971.....		1
April 21, 1971.....		123
April 22, 1971.....		157
April 26, 1971.....		189
April 27, 1971.....		225
PART 2		
April 28, 1971.....		325
PART 3		
April 29, 1971.....		675
PART 4		
April 30, 1971.....		1175
Text of—		
House Concurrent Resolution 241.....		3
H.R. 3968.....		62
H.R. 3970.....		84
H.R. 4994.....		9
H.R. 4995.....		33
H.R. 5220.....		62
H.R. 5221.....		84
H.R. 5459.....		84
H.R. 5460.....		62
H.R. 6528.....		9
H.R. 7514.....		37
Report of—		
Commerce Department on H.R. 3968.....		88
Office of Management and Budget on House Concurrent Resolution 241, H.R. 3968, and H.R. 4994.....		88
Office of Management and Budget on H.R. 7514.....		89
Statement of—		
Baker, Charles D., Assistant Secretary for Policy and International Affairs, Department of Transportation.....		89
Baylor, James, insurance commissioner, State of Illinois.....		1226
Bernstein, George K., Administrator, Federal Insurance Administra- tion, Department of Housing and Urban Development.....		1321
Chilcott, Richard G., vice president, Nationwide Insurance Cos.....		1206
Clayman, M. Jacob, administrative director, Industrial Union De- partment, AFL-CIO.....		677
Comey, Dale R., chairman, actuarial committee, American Insurance Association.....		1110
Danstedt, Rudolph, assistant to president, National Council of Senior Citizens.....	163,	167
Davidson, Louis G., past chairman, ABA section of insurance.....		700
Davis, John, executive vice president, Ryder System.....	215,	222
Deacy, Thomas E., Jr., American College of Trial Lawyers.....		700
Denenberg, Dr. Herbert S., commissioner, Pennsylvania Insurance Department.....		225

Statement of—Continued

Page

Dukakis, Michael S., Brookline, Mass.....	124
Edidin, S. M., vice president and general counsel, Hertz Corp.....	215
Farnham, C. Eugene, commissioner of insurance, State of Massachusetts.....	1175
Finneson, Dr. Bernard E., Ridley Park, Pa.....	157
Griffith, Robert W., vice president and casualty actuary, Nationwide Insurance Cos.....	1206
Hanson, John, executive secretary, National Association of Insurance Commissioners.....	581
Harrington, Hon. Michael, a Representative in Congress from the State of Massachusetts.....	123
Hutton, William R., executive director, National Council of Senior Citizens.....	163
Jones, T. Lawrence, president, American Insurance Association.....	1110
Keeton, Dr. Robert, professor, Harvard Law School.....	1175
Klein, Robert, economics editor, Consumers Union of the United States.....	202
Kronzer, W. James, Jr., Texas Trial Lawyers Association.....	570
Kuhn, Edward W., past president, American Bar Association.....	700
Lemmon, Vestal, president, National Association of Independent Insurers.....	1078
Loescher, Samuel M., professor of economics, Indiana University.....	662
McGowan, Robert V., president, National Association of Mutual Insurance Agents.....	270
Mackoff, Benjamin, administrative director, Circuit Court of Cook County, Ill.....	142
Maisonpierre, André, vice president, American Mutual Insurance Alliance.....	605
Markus, Richard M., president, American Trial Lawyers Association.....	299
Max, Frank J., Jr., president, CATRALA, and vice president, Avis Rent-A-Car Systems, Inc.....	215
Mertz, Arthur C., vice president and general counsel, National Association of Independent Insurers.....	1078
Mikva, Hon. Abner J., a Representative in Congress from the State of Illinois.....	189
Morrow, Winston V., Jr., chairman of the board and president, Avis Rent-A-Car System, Inc., as read by John J. Murphy, vice president and director of insurance and safety.....	215, 220
Murphy, John J., vice president and director of insurance and safety, Avis Rent-A-Car System, Inc.....	215, 220
O'Brien, John J., Franklin Center, Pa.....	151
Reardon, Judge John T., circuit court, Quincy, Ill., representing the American Bar Association.....	700
Reid, John N., associate general counsel, American Insurance Association.....	1110
Ryan, John G., attorney.....	1175
Sargent, Hon. Francis W., Governor of the State of Massachusetts.....	1175
Scariano, Hon. Anthony, a member of the Illinois General Assembly.....	189
Schenk, Benjamin, New York State superintendent of insurance.....	325
Smalley, Robert A., president, Hertz Corp.....	215, 217
Steers, Hon. Newton I., Jr., a State senator from the State of Maryland.....	171
Vaccarello, Vince, chief deputy director of insurance, State of Illinois.....	1226
Volpe, Hon. John A., Secretary, Department of Transportation.....	89
Walsh, Richard F., Deputy Director, Policy and Plans Development, Department of Transportation.....	89
Wandel, Dr. William H., professor of insurance, Temple University, Philadelphia, Pa.....	178
Warne, Dr. Colston E., president, Consumers Union of the United States.....	202
Watkins, Frederick D., president, Aetna Insurance Co.....	247
Woodcock, Leonard, president, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America—UAW.....	262
Worthington, Lorne R., president, National Association of Insurance Commissioners.....	581

Additional material submitted for the record by—

American Bar Association:

Article entitled "The Automobile Accident Reparations System and the American Bar Association".....	Page 980
Condensation of recommendations of ABA Report No. 18.....	968
Report No. 18 of ABA special committee on automobile accident reparations.....	705
Vol. 1—Executive summary of recommendations and conclusions, California Governor's Automobile Accident Study Commission.....	999

American Federation of Labor-Congress of Industrial Organizations:
Biemiller, Andrew J., director, Department of Legislation, AFL-CIO, statement.....

Chart: Damage to cars and property.....	675
Chart: Personal injury liability claims.....	693
Chart: Policyholders' own collision and comprehensive.....	692
Price and availability in the market for automobile insurance—fault versus nonfault compensation schemes.....	693
	680

American Insurance Association:

Article from the Minneapolis Tribune, April 22, 1971, entitled "Bar Should Correct Mistakes".....	1139
Booklet: Highlights of the New Massachusetts Auto Insurance Law.....	1161
Booklet: Massachusetts No-Fault Auto Plan.....	1151
Booklet: Massachusetts Personal Injury Protection Plan.....	1155
Statement of T. Lawrence Jones, president, before the Senate Commerce Committee's Antitrust and Monopoly Subcommittee, December 15, 1969.....	1117
Table—No-fault legislation proposed in 1969, 1970, and 1971.....	1137

American Mutual Insurance Alliance:

Comparative pure loss costs.....	653
News release dated April 28, 1971.....	661
State automobile insurance studies.....	652

American Mutual Insurance Cos., telegram dated April 26, 1971, from Richard H. Schannen, general counsel, to Chairman Moss, expressing support for AMIA guaranteed protection plan.....

1342

American Trial Lawyers Association:

Circle charts "Where the premium dollar goes" with notes.....	316
Justification of estimated property damage percentage.....	319

American Trucking Associations, Inc., Peter T. Beardsley, president and general counsel, statement.....

668

Baylor, James, insurance commissioner, State of Illinois:

Article from Bloomington, Ill., Daily, April 8, 1971, entitled "Ogilvie Insurance Proposals Offer Benefits to Motorists".....	1309
Article from Chicago Daily News, April 6, 1971, entitled "Auto Insurance Reform".....	1305
Article from Chicago Daily News, April 6, 1971, entitled "Risk Firms Hail Ogilvie No-Fault Plan".....	1306
Article from Chicago Sun-Times, April 7, 1971, entitled "For Auto Insurance Reform".....	1308
Article from Chicago Today, April 6, 1971, entitled "For 'No-Fault' Car Insurance".....	1304
Article from Chicago Today, April 6, 1971, entitled "'No-Fault' Car Insurance: Insurers Pro, Lawyers Anti".....	1304
Article from Chicago Today, April 7, 1971, entitled "No-Fault Insurance Passage Predicted".....	1308
Article from Chicago Tribune, April 7, 1971, entitled "The Illinois Plan for Auto Insurance".....	1307
Article from Illinois News, April 29, 1971.....	1311
Booklet: Auto Reparations in Illinois—The Illinois Plan.....	1251
Editorial, station WGN, April 24-27, 1971, "No-Fault Auto Insurance".....	1310
Editorial, WMAQ-TV, April 26, 1971.....	1310
Letter dated April 28, 1971, from Hon. Richard B. Ogilvie, Governor of the State of Illinois, to Chairman Moss, re Illinois plan.....	1230

Additional material submitted for the record by—Continued

	Page
Baylor, James, insurance commissioner, State of Illinois—Continued	
Newscip, Herald-WHIG, April 6, 1971, "Ogilvie's Insurance Plan"-----	1306
Special message on traffic safety to 77th General Assembly by Governor of Illinois-----	1232
Special message on insurance to 77th General Assembly by Governor of Illinois-----	1242
Bell, Fletcher, commissioner of insurance, State of Kansas, letter dated March 30, 1971, to Congressmen Larry Winn, Jr., and William R. Roy, endorsing the administration approach to reform of the automobile insurance system-----	1340
Blue Cross Association, letter dated May 4, 1971, from Walter J. McNerney, president, to Chairman Moss re health-care costs resulting from automobile accidents-----	1339
Communications Workers of America, statement of Joseph A. Beirne, president-----	1331
Consumers Union of the United States: Exhibit A—Adapted from article "Insurance: The Road to Reform" in April 1971 issue of Consumer Reports-----	208
Independent Mutual Insurance Agents Associations of New York, New Jersey, and Connecticut, statement of National Affairs Committee-----	1333
International Longshoremen's & Warehousemen's Union, statement-----	1332
Liberty Mutual Insurance Co., letter dated May 17, 1971, from Robert A. Penney, counsel, to Chairman Moss, endorsing the view that action in the field of no-fault automobile insurance should be left to the States-----	1342
Mackoff, Benjamin, administrative director, Circuit Court of Cook County, Ill., editorial from Wall Street Journal dated April 21, 1971-----	147
Moss, Hon. John E., a Representative in Congress from the State of California:	
Article from July 1966 Life edition of Best's Insurance News: Plain talk about the possibility and merit of Federal supervision of insurance-----	657
Biographical sketch of George K. Bernstein, Administrator, Federal Insurance Administration, Department of Housing and Urban Development-----	1321
Tabulation of responses to TV program "The Advocates"-----	659
Motorcycle Industry Council, Inc., statement-----	1337
National Association of Independent Insurers:	
Excerpt from Advance Payments in Liability Claims (Buchheit, Young & Kurtok)-----	1098
Guiding principles relating to automobile insurance claims-----	1100
NAII dual protection plan-----	1089
National Association of Insurance Commissioners, Iowa Insurance Department budget-----	598
National Association of Mutual Insurance Agents:	
Exhibit A—The role of the independent agent in the marketing of automobile insurance-----	271
Exhibit B—Motorists' insurance—Protection plan-----	273
Exhibit D—State insurance department statistical data, year ending December 31, 1969-----	282
National Association of Mutual Insurance Cos., statement-----	1335
National Council of Senior Citizens, article from New York Times dated April 22, 1971-----	166
Nationwide Insurance Co., plan for reform of the automobile insurance system-----	1213
Rogers, Norman L., president, Lawyer Reform of the United States, statement-----	1338
Sargent, Hon. Francis W., Governor of the State of Massachusetts, technical review entitled "The New No-Fault Insurance Plan"-----	1183
Scariano, Hon. Anthony, a member of the Illinois General Assembly: Table 1.—Members on State legislative committees having jurisdiction over no-fault bills whose occupations were listed as lawyer and insurance—10 selected States, 1969-----	192

Additional material submitted for the record by—Continued

Scariano, Hon. Anthony, a member of the Illinois General Assembly—Continued

Table 2.—Members of 10 selected State legislatures whose occupations were listed as lawyer and insurance, 1969-----	Page 192
Occupational characteristics of senate and house members of 10 State legislative committees on insurance, 1971-----	193
Article from Chicago Today, April 15, 1971, entitled "No-fault Car Insurance Has Faults"-----	198
Critique by Prof. Jeffrey O'Connell of the Illinois auto reparations plan-----	199
Schenk, Benjamin, New York State superintendent of insurance, report, "Automobile Insurance—For Whose Benefit?" with actuarial supplement-----	339
Transportation Department:	
Amplification of views on State-by-State adoption of no-fault automobile insurance-----	116
Estimated aggregate number and volume of auto accident liability claims, by type of claim, 1968-----	121
Five-year cost estimates for implementing H.R. 7514 and House Concurrent Resolution 241-----	108
Watkins, Frederick D., president, Aetna Insurance Co., results of Gallup poll on no-fault insurance published in the Courant, April 22, 1971-----	254

ORGANIZATIONS REPRESENTED AT HEARINGS

Aetna Insurance Co., Frederick D. Watkins, president.

American Bar Association:

Davidson, Louis G., past chairman, section of insurance.

Deacy, Thomas E., Jr., American College of Trial Lawyers.

Kuhn, Edward W., past president.

Reardon, Judge John T., circuit court, Quincy, Ill.

American Federation of Labor-Congress of Industrial Organizations:

Biemiller, Andrew J., director, department of legislation.

Clayman, M. Jacob, administrative director, industrial union department.

American Insurance Association:

Comey, Dale R., chairman, actuarial committee.

Jones, T. Lawrence, president.

Reid, John N., associate general counsel.

American Mutual Insurance Alliance, André Maisonnier, vice president.

American Trial Lawyers Association, Richard M. Markus, president.

American Trucking Associations, Inc., Peter T. Beardsley, vice president and general counsel.

Avis Rent-A-Car System, Inc.:

Max, Frank J., Jr., vice president.

Morrow, Winston V., Jr., chairman of the board and president.

Murphy, John J., vice president and director of insurance and safety.

Car and Truck Renting and Leasing Association (CATRALA), Frank J. Max, Jr., president.

Consumers Union of the United States:

Klein, Robert, economics editor.

Warne, Dr. Colston E., president.

Hertz Corp.:

Edidin, S. M., vice president and general counsel.

Smalley, Robert A., president.

Housing and Urban Development Department, George K. Bernstein, Administrator, Federal Insurance Administration.

National Association of Independent Insurers:

Lemmon, Vestal, president.

Mertz, Arthur C., vice president and general counsel.

National Association of Insurance Commissioners:

Hanson, John, executive secretary.

Worthington, Lorne R., president.

National Association of Mutual Insurance Agents, Robert V. McGowan, president.

National Council of Senior Citizens:

Danstedt, Rudolph, assistant to president.

Hutton, William R., executive director.

Nationwide Insurance Co.:

Chilcott, Richard G., vice president.

Griffith, Robert W., vice president and casualty actuary.

Ryder System, John Davis, executive vice president.

Texas Trial Lawyers Association, W. James Kronzer, Jr.

Transportation Department:

Baker, Charles D., Assistant Secretary for Policy and International Affairs.

Volpe, Hon. John A., Secretary.

Walsh, Richard F., Deputy Director, Policy and Plans Development.

United Automobile, Aerospace and Agricultural Implement Workers of America—
UAW (International Union), Leonard Woodcock, president.

NO-FAULT MOTOR VEHICLE INSURANCE

THURSDAY, APRIL 29, 1971

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2322, Rayburn House Office Building, Hon. John E. Moss (chairman) presiding.

Mr. Moss. The committee will be in order.

At this time, the Chair would like to ask unanimous consent to place in the record the testimony of Mr. Andrew Biemiller of the American Federation of Labor, which he would have presented had he been able to appear today. Illness has prevented his appearance. Is there objection?

Hearing none, the testimony will be placed in the record at this point.

(Mr. Biemiller's prepared statement follows:)

STATEMENT OF ANDREW J. BIEMILLER, DIRECTOR, DEPARTMENT OF LEGISLATION,
AFL-CIO

Mr. Chairman, I am delighted to be here today to testify on proposals for auto insurance reform as set forth in H. Con. Res. 241, introduced by Mr. Staggers and Mr. Springer on March 29 and on H.R. 4994 introduced by the Chairman of this Subcommittee, Mr. Moss, on February 25.

Let me say at the outset that the AFL-CIO fully supports H.R. 4994 and strongly urges the rejection of H. Con. Res. 241.

Principally, H.R. 4994 would create a federal requirement that auto insurance policies be issued on a "no-fault" basis for compensation of losses for injury and death, to become effective within one year after enactment.

H. Con. Res. 241 merely urges the state legislatures to "evolve" an auto insurance system of an equitable nature, including provision for the "no-fault" principle in injury cases. The Secretary of Transportation would be asked to monitor the progress of the states and issue a report 25 months later on the progress that had been made and the feasibility of attaining a satisfactory system without further legislation.

Mr. Chairman, I think we can safely forecast at the outset that no satisfactory system is likely to "evolve" at the state level for many, many years, if ever. We can see no possible excuse for postponement of a uniform system of equitably-based auto insurance. Federal legislation is the only way in which such a system can be made available promptly. We see no reason for another 2-year delay to verify this predictable certainty.

As early as February 1967, the AFL-CIO Executive Council called for a thorough investigation of the insurance industry and the development of federal legislative remedies for its deficiencies. In subsequent testimony on proposals in Congress to authorize a comprehensive auto insurance study by the Department of Transportation, we made the following statement:

"We cannot pretend to superior wisdom as to the best solution to the ills of the auto insurance program, but we are frank to say that we have little confidence

that these problems can ultimately be resolved by voluntary action on the part of the insurance industry or by action of the 50 separate states."

We are still of this view.

The Department of Transportation has now issued its study, comprising 24 volumes, including its final report on "Motor Vehicle Crash Losses and Their Compensation in the United States." The report is truly an excellent one, and its specifications for a reformed system are clearly, and succinctly set forth.

There is indeed, little disagreement with the report's conclusions as to the need for reform and the substance of the reform that should be made as reflected in the provisions of either H.R. 4994 or H. Con. Res. 241. The fundamental difference is whether to proceed immediately with federal reform legislation or to leave it to the states, the solution which is being backed by the Nixon Administration.

On February 19, 1971, the AFL-CIO, in a statement on Consumer Protection, specifically called for federal auto insurance reform legislation as outlined in a series of bills which had been introduced late in 1970 by Senator Hart. H.R. 4994 is this year's version of one of these bills, currently being sponsored in the Senate by Sen. Magnuson and Sen. Hart as S. 945.

The relevant portion of the Executive Council statement is as follows:

"The Comprehensive Automobile Insurance and Compensation Study conducted by the Department of Transportation has been largely completed and Congress should be in a position to act concretely on the crisis in auto insurance. The outlines of constructive auto insurance reform have already been laid out in legislative proposals introduced by Senator Philip Hart toward the close of the last Congress. We are glad to endorse this approach, including the introduction of the "no-fault" principle into the basic system of compensation to accident victims, the encouragement of group coverage and the provisions designed to reduce the costs of auto repair."

The operative word which commands a federal solution is "crisis"—the "crisis in auto insurance." A crisis calls for action now and not two, three or 20 years later, as would be the inevitable result of leaving the problem to the states.

The substance of the Department's massive report, if not the eventual recommendations of Administration's spokesmen based upon the report, fully document the existence of the crisis.

Here is the summary indictment made by the report of the existing situation: "In summary, the existing system ill serves the accident victim, the insuring public and society. It is inefficient, overly costly, incomplete and slow. It allocates benefits poorly, discourages rehabilitation and overburdens the courts and the legal system. Both on the record of its performance and on the logic of its operation, it does little if anything to minimize crash losses."

Can we afford delay in changing a tort liability system which:

Costs \$1.07 to operate for every \$1.00 paid out in net benefits to victims;

Pays benefits to only 45 percent of all fatally or seriously injured victims of auto accidents;

Compensates only 1/3 of economic losses of victims with large losses (\$25,000 or more) while paying out 4 1/2 times actual economic losses for those with small losses (under \$500);

Delays final payments to seriously injured victims or their survivors an average of 16 months;

Contributes more than 200,000 cases a year to the nation's court load and absorbs more than 17 percent of the country's total judicial resources?

Clearly the Moss bill (H.R. 4994) is responsive to this crisis, while H. Con. Res. 241 is responsive only in its very eloquent preamble—a magnificent summary. I may say, of why action should be taken—a preamble which deserves far better than its lame conclusion.

H.R. 4994 would establish a basic system of no-fault insurance for personal injury, and compensate all injured victims of automobile accidents. It would institute compulsory insurance for all motor vehicles on the road, and forbid insurers to refuse, cancel or fail to renew insurance for motorists, except for loss of an operator's license or failure to pay premiums. All economic losses due to injury or death (after offsets from other compensation systems) would be fully paid, with a limitation only on wage replacement (\$1,000 per month for 2 1/2 years or \$30,000 in case of death). Victims of "catastrophic harm," including permanent and total disability or irreparable and severe disfigurement, could still sue for additional compensation under the traditional liability system.

H.R. 4994 does not institute Federal regulation of rates charged for insurance. It does provide, however, for compilation by the Secretary of Transportation of

claims and loss experience data and actual rates or premiums being charged by each insurer. The Secretary is directed to issue a report twice a year analyzing these data for the benefit of state authorities and the general public. This should help the public in shopping for insurance and generate at least some pressure for keeping rates down, both by public authorities and possibly even through greater competition among insurers themselves.

We cannot testify as experts on the complexities of auto insurance. As pointed out in the Department's report, these are poorly understood by the general public and the average motorist. But we are convinced by the weight of expert opinion, such as is represented in the Department's report, that basic changes must be made and that one of these is the shift from a liability system of reparations to a true insurance system of compensation. Other reforms will be needed, but this one is a large part of the package.

We urge the Committee to act promptly and favorably in reporting out H.R. 4994.

Mr. Moss. Now our first witness is Mr. Jacob Clayman, administrative director, Industrial Union Department, AFL-CIO.

Mr. Clayman.

STATEMENT OF M. JACOB CLAYMAN, ADMINISTRATIVE DIRECTOR, INDUSTRIAL UNION DEPARTMENT, AFL-CIO

Mr. CLAYMAN. Mr. Chairman and members of the committee, I have with me Philip Daugherty, member of our IUD staff and, as you have indicated, I am administrative director of the IUD of AFL-CIO and we represent 59 international and national unions, approximately in excess of 6 million members.

Before I immediately address myself to the written testimony, a few quick observations. We don't appear here as technical experts, because indeed we are not, although I almost became one yesterday.

We are here because there is a deep and growing concern among workers everywhere about our present system of automobile insurance. Of all of the consumer issues, I believe that this issue is one of the top-most that gnaws away at the sensitivities and the pocketbooks of our membership. And I say this based on many, many trips over the country listening to and talking with membership—a sense of frustration, often a sense of real anger, atrocity stories by the yard. And unfortunately they are true atrocity stories. The atrocity is that they happen to be true. The whole matter of cancellation, the matter of costs, the feeling on the part of our people over the various States that State government mainly is the captive of the industry in this situation, and, for example, so frustrated that, in the State of Ohio the State organization of AFL-CIO is seriously considering setting up its own insurance company and automobile insurance company.

When you realize how foreign the idea of having its own company, its own corporation, is among workers you can believe that this real desire now and which may come to fruition in the near future unless something happens here in Washington or in Columbus, Ohio, the significance of this particular point is there.

That is the background of our appearance here, not that we are technicians, not that we can dot every "i" and cross every "t" in this bill, but rather a feeling that at long last there needs to be some drastic change in the whole concept of automobile insurance.

With that, let me quickly—because the statement is relatively short—let me quickly address myself to the specific statement in front of you.

In testifying before your subcommittee last week, Secretary Volpe

made it abundantly clear that the present auto insurance-accident reparations system is not performing in a socially responsible fashion. It is costly, wasteful, and completely unjust. Compensation under the present system is untimely, unpredictable, malapportioned, and uncoordinated. Worse yet, too many seriously injured accident victims go uncompensated, and too many dependents of fatality cases receive little, if any, benefits from the system.

The system is terribly inequitable because it confers the greatest injustices on the most disadvantaged members of our society. Three-fifths of the families in this country have incomes of less than \$10,000. One of the DOT studies found that seriously injured auto accident victims in this income bracket recovered only 46 percent of their personal and family economic loss. Yet, these victims suffered over four-fifths of the total loss of all those auto accident victims that particular year. This same study reveals that those auto accident victims who completed the eighth grade recovered 23 percent of their losses, while those with college training recovered 64 percent.

And, while I don't want to unduly take your time, because I know you are rushed, this in itself tells a very detailed matter: that recovery apparently is unrelated under our present system to rightfulness or wrongfulness of the parties, but is dependent in good part on the skill, intelligence, training, the capacity to get legal service, and all the rest. And those figures, if nothing else, lay bare the tragic inequity of the present system.

The tragedy of all this is that these people with incomes less than \$10,000 are likely to be paying the highest premiums for this lack of protection. For example, a 23-year-old married man living in the city—where many of our more disadvantaged live—for a standard bureau-company-issued policy, would pay \$587 in Los Angeles, \$619 in Chicago, \$706 in Philadelphia, and \$486 in Detroit.

It is no wonder that Secretary Volpe testified before you last week that "the present system needs change badly, and needs it now." Nevertheless, all the administration could offer in support of implementing a no-fault auto insurance system "now" was a concurrent resolution—a rather meaningless piece of paper. And this may be a harsh indictment, but at least we believe it to be relatively meaningless. It obviously is a well-meant, notwithstanding a pious, gesture to the States, "Please, States, why don't you shape up?"

The likelihood is that the response, unless there is further probing of a meaningful nature, will not result in significant reaction. This resolution would do nothing except allow the States with their part-time legislators, many of whom make their living off of auto accident cases, to enact lawyer-and-insurance-company-type plans, if they do anything at all.

The present system does need change now. We ask that H.R. 7514 be approved now and that goal will be realized. Incidentally, I started out by saying I was not a technician, expert in this area. I am not certain that I am prepared to dot every "i" and cross every single "t" in that bill, but its basic thrust, in our judgment, is sound. However, we would like to suggest that section 6 be strengthened by giving the Secretary of DOT authority to establish the maximum amount or percentage to be allowed as surcharges. We say this because, as good as the pricing and claims information scheme might look on paper, it will not pre-

vent the companies from pricing some of the public out of the market—and we are not talking about the completely irresponsible driver. We feel that the average person will not understand the pricing and claim information. It might be of some aid to the fellow with college training in mathematics, but the majority are not that fortunate, and that includes me. The bill also leaves State regulation of auto insurance rates to the States. Our State organizations have learned to their members' sorrow over the years that it is futile to fight auto insurance rate increases in most of the States, particularly in those where the insurance commissioner has little or no power to review the rates before they are put into effect. Ohio, California, Georgia, New York, Illinois, and Missouri are such States.

While I don't want to try to steal the front stage center from your witness tomorrow, the Governor of Massachusetts. I did read quickly his observations before some insurance group the other day, and I suspect this is "old hat" to you now, but it impressed me. He said they were making astounding savings, over at least a 3-month period, and I don't know if it is a long enough period, but he was scolding the insurance industry because so far they were making no move at all in the direction of plowing back these kinds of savings to the ordinary claimants. I was impressed with that observation of his, but I don't want to speak more about it because I understand he is coming tomorrow and I suspect he knows best his own State and his own case.

Why even under the administration's unprogressive health insurance program, which will enrich the private health insurers, HEW Secretary Richardson has said that there would be Federal regulation of policy forms and rates. We aren't even asking for complete rate regulation, but only recommending that ceilings be placed on surcharges.

Another aspect of the bill we endorse fully is the provision, section 5(e), in essence requiring the insurance companies to serve the public. If the no-fault coverage is compulsory, the companies cannot be left free to deal with the public as they please. This is the case today. Our members complain bitterly about the arbitrary treatment they receive from the companies. When they attempt to use the insurance and collect, many times they are canceled or the policy not renewed. If they aren't dropped by the company, their rates are increased. Everybody has his own family horror story. I could present one. I will save you from it, because they are myriad and I have had two of the tiniest little accidents in my whole long life and the last time I had one my rate just bloomed. I probably paid for the thing a couple of times before finally my rate went down again, but I will not bore you with that. Virtually every family in America has the same kind of true-seeming atrocity story.

Secretary Volpe implied that a no-fault system would eliminate most of the abuses. Perhaps it will. But the feeling I got from reading a memorandum to the Federal Trade Commission from the National Association of Independent Insurers on Price and Availability in the Market for Automobile Insurance—Fault vs. Non-Fault Compensation Schemes, the 360 companies represented by this association would continue some of their very same underwriting practices under no-fault. These companies, and I quote "are predominately automobile insurers and write well over 50 percent of the private passenger auto-

mobile insurance business in the United States." All we can say is, for the public's sake, enact H.R. 7514 with section 5(e).

If I may introduce for the record the memorandum to the Federal Trade Commission from the National Association of Insurers.

Mr. Moss. Any objection to the introduction in the record?

Hearing none, the memorandum will be included.

(The memorandum referred to follows:)

PRICE AND AVAILABILITY IN THE MARKET FOR AUTOMOBILE INSURANCE—FAULT VS. NON-FAULT COMPENSATION SCHEMES

The National Association of Independent Insurers is a voluntary trade association of some 360 property-liability companies of all types—stocks, mutuals, reciprocals, and Lloyds. Our affiliated companies are predominately automobile insurers and write well over 50% of the private passenger automobile insurance business in the United States. For this reason, our companies are extremely interested in your deliberations and our Association wants to co-operate with you in every possible way.

It is our understanding that the attached questions were prepared by a member of the Federal Trade Commission's staff for the purpose of comparing the effect of a "fault" or "non-fault" plan on various rating, underwriting and marketing considerations. A follow-up letter from Mr. Nathaniel Greenspun, Senior Economist of the FTC, expressed the desire that our questions be answered on the basis that a "fault" scheme is essentially one which is now in effect in most states, and that a "non-fault" scheme is specifically the one contemplated in a draft of June 17, 1969, titled "Personal and Property Protection Motor Vehicle Insurance Act" (PPPMVIA) intended for consideration in Massachusetts. Although you have asked us to specifically compare these two types of plans, we feel that many of the comments made in this memorandum are applicable to most of "non-fault" programs which have been developed.

The specific program to which you refer is but one of what we believe will prove to be many versions of the originally proposed program of the American Insurance Association. Because of the significant number of changes that have been made, it is extremely difficult for us to be very definitive in our response.

We also believe that we cannot answer these questions without first commenting in some detail on the implications that are involved in defining the "Personal Property Protection Motor Vehicle Insurance Act" as a "non-fault" system. To describe that plan (or the subsequent versions thereof) as being a "non-fault" scheme is somewhat misleading and, in our judgment, an oversimplification.

Clearly the present system of auto insurance has many coverages which pay benefits regardless of fault: the Collision and Comprehensive Coverages, the Medical Payments Coverages, and the Accidental Death and Accident Disability Income Coverages. Further, both the Cotter Plan and the proposals of Professors Keeton and O'Connell involve substantial broadening of coverages that would be payable on a "non-fault" basis.

The two major features which are unique to the PPPMVIA plan is that it eliminates all recoveries for general damages and also eliminates all responsibility for negligent conduct as it pertains to the use of a motor vehicle. A more appropriate term to apply to such a system would be a "no-responsibility" plan.

The description "non-fault" does, of course, have an appeal. It conveys the impression that the characteristics of the present system which some people feel are tiresome and burdensome would be eliminated by such a proposal. But this would not prove to be the case of the AIA plan. As is the case with most revolutionary proposals, the concept is easy to advocate in broad terms, but, far more difficult to establish in specific details. Yet, these "details" that are so difficult to pin down are of a very great substance. A review of some of the clarifications and changes that have occurred between the original proposal and the draft we are to use for this comparison will illustrate this point. Probably of even greater importance are the changes that would undoubtedly occur if such a proposal was adopted by a legislature. We can visualize such a law passing a legislature in one session and then, based upon horrible examples of serious accidents, the pain and suffering feature being added back in a subsequent session. The net result would be a total system much more expensive than the present one.

The changes that have occurred between the original draft and the draft that we are directed to use are—

(1) The first draft stated that “. . . the automobile insurance system should be primary.” The latter makes the benefits excess of “. . . all disability, medical and survivor benefits a claimant recovers or is entitled to receive from any statutory source . . .” (The latter provision does serve the purpose of avoiding duplication of payments and reducing the cost of the plan, but, since compensation for pain and suffering “apparently” would be eliminated, it is difficult to see what benefits would remain for elderly persons who have retired under Social Security and Medicare.)

(2) The former contains a “Permanent Impairment Benefit” for “permanent impairment or disfigurement” of up to 50% of hospital and medical expenses. This does not appear in the draft that was submitted in Massachusetts. This point was confused, however, by the verbal testimony and by the news releases prepared to outline this plan. We have been told that the news release indicated that some extra payment would be provided to persons who sustained permanent impairment or disfigurement in the amount of up to 50% of their hospital and medical expenses. In responding to your questions, this would make a difference as far as the pricing is concerned.

(3) The first plan exempted both private passenger and commercial vehicles from tort liability. This would have shifted a substantial amount of the costs from the commercial carrier to the private passenger owners. Evidently, this shifting was recognized since in the Massachusetts draft, the owner of the commercial vehicle is held to be responsible for the payment of benefits and property damages for any private passenger automobile for any accident in which his vehicle was “involved,” regardless of how negligent the driver of the automobile may have been. Thus, this change goes to the other extreme which is as equally inequitable. Neither of these solutions, then, is fair and yet a compromise of either would destroy the basic “no-fault” premise. It is a serious dilemma which goes to the very heart of the “no-fault” plan.

The foregoing clarifications and changes in the plan as originally proposed have been made even before such a plan has been subject to the thorough scrutiny of a legislative committee. We suspect the results of any public hearings would be additional changes.

The change which we feel would most likely be made in the Massachusetts proposal before it was enacted into law would be to retain tort liability with respect to damages to vehicles. Significantly, the advocates of this plan place virtually all their emphasis on the effects the plan would have for bodily injury. Only passing reference is made to the dramatic effect it would have on persons whose automobiles are damaged due to the negligence of others. If such persons should choose not to buy the optional “physical damage insurance,” they will have to bear the full cost of such damages. Even if a person purchases this insurance, he will have to self-insure the cost of the deductible.

The recent studies show that bodily injury coverages account for only about $\frac{1}{3}$ of the total premium paid for a typical package plan of automobile insurance and that $\frac{2}{3}$ of the premium goes for coverages of the vehicle, primarily to pay for auto repairs. We feel this is a significant point which has been overlooked in pricing and in evaluations of public reactions.

We don't believe that sufficient attention has been given to the reaction of the car owner when he finds that he has no recourse against the negligent driver who has seriously damaged his car. This result will be particularly hard on individuals of modest means who typically buy used cars and maintain them in good condition. Frequently, such individuals do not buy collision insurance today—especially those who are confident of their careful driving practices. (NAII's statistics show that approximately 40% of the policyholders of our affiliated companies do not purchase collision insurance.) Under the proposal in Massachusetts, they would have to buy the more costly “physical damage” insurance, or alternately, to self-insure. This proposal would impose a substantial burden on those of modest means whose automobiles were damaged through the negligence of others. This would include not only those of modest income, but also the elderly, the young, and many residents of inner cities who usually buy cars at as low a cost as possible. Since accident rates are highest in the cities, the effect on the residents of such areas would be most pronounced.

We believe that a review of recent developments in British Columbia will demonstrate the impracticality of attempting to eliminate tort liability as it pertains to property damage. In July of 1969, the legislature of British Columbia

enacted amendments to both the Insurance Act and the Motor Vehicle Act. The amendments to the Insurance Act made bodily injury liability insurance compulsory with a minimum amount of \$50,000. It also made mandatory, Accident Benefits on a "non-fault" basis. These benefits will provide various medical, wage loss, and death benefits.

The amendment to the Motor Vehicle Act would release individuals from liability for any property damages they have caused to the extent such damages were in excess of \$250. However, the "at fault" individual would remain liable for the first \$250 of damages. The drafters of the legislation and the law as enacted contemplated that an individual should not be permitted to buy insurance to protect himself against the first \$250 of property damage liability. (We understand that the intent of this latter provision was that it would have a substantial deterrent effect on the driving habits of irresponsible individuals.) It was contemplated that the claims for the first \$250 of liability would be settled in small claims courts. Subsequently, consideration was given to allow property damage liability insurance to be sold as a separate policy.

The government of British Columbia has "proclaimed" the amendments to the Insurance Act effective 1/1/70. This will result in an increase in the cost of bodily injury insurance of about \$13 per policy. (A gross of \$22 for the first-party Accident Benefits, less \$9 to reflect an off-set in the cost of the Bodily Injury Liability coverage.) However, the government never "proclaimed" the amendments to the Motor Vehicle Act. The government failed to proclaim the Motor Vehicle Act because of the adverse reaction expressed at public hearings and to the members of the legislature when it became known what effect these amendments would have on individuals whose property was damaged by the reckless driving of others. Our statistics show that for every bodily injury claim there are 4 or 5 property damage claims.

As we write this, the government of British Columbia finds itself on the horns of a dilemma. When the two amendments were enacted, it was expected that the addition of the "non-fault" accident benefits would have the effect of increasing the cost of bodily injury insurance—but that this increase would be more than off-set by the "savings" that resulted from the elimination of liability for property damages in excess of \$250 and by not making liability insurance available for the first \$250 damages. The total "net savings" on the mandatory coverages were expected to be in the area of a 20%-25% reduction in average insurance premiums.

Because the amendments to the Motor Vehicle Act were not proclaimed, the public in British Columbia now finds that the cost for liability insurance has been substantially increased. Despite the substantial amount of study that has been given to this subject by various bodies of the legislature of British Columbia and by their Insurance Department, they have not found a solution to this dilemma. Nor, at this time do we see a solution that would be acceptable to the citizens of British Columbia.

We feel that any legislature which adopts such a plan with the anticipation of lowering the cost of insurance to a consumer will ultimately find itself confronted with the same situation. One of the major *purposes* of the amendments enacted in British Columbia was to achieve a substantial reduction of the average premiums for auto insurance.

The promise of savings has been one of the keystones used by the advocates of "no-fault" plans to support their program. We must say that quite candidly, we do not believe that the average savings suggested by the proponents of these plans will be realized. In our judgment, cost savings can only be made by benefit reductions. The basic cost study material presented by the proponents of this plan, as supported for its projections, have been disputed by other actuaries. The AMIA in its study of the cost estimates offered by the AIA in support of its "Complete Personal Protection Automobile Insurance Plan" indicated that the large savings are over-stated and cannot be substantiated by evidence available. The AMIA found that the plan would increase the cost of bodily injury coverage by at least 29% instead of reducing it by the 25% as indicated. This, in turn, reduces, and in some cases eliminates, the overall savings which the AIA projected for various combinations of coverages and policy limits. In addition, our own actuaries not only agree with the AMIA's critique, but, they also question the appropriateness of some of the data used in the study. They indicate that the data used was compiled under the liability system and cannot validly be applied to all aspects of a completely new system which is essentially an accident and health plan unless the statistical work is seasoned with a large degree of judg-

ment to reflect the differences in the systems. A substantial adjustment, for example, must be made to reflect what would happen to costs as a new system becomes operative; that is, as all the parties involved in a claim for benefits adapt their behavior to the new accident and health environment.

Take for example a man who has been disabled in an intersection accident where the question of liability is in doubt. Because of the unresolved question of liability, he is not sure he will collect from the other party to the accident. He has suffered broken ribs and a painful back strain. Because he is only partially compensated for his loss of wages by his employer's salary continuation plan, he returns to work as soon as he can—say in two weeks. Most of his hospital and medical expenses are covered by a personal hospital and surgical insurance policy he has bought.

How would the same claimant behave in the environment that would result if the PPPMVA plan were to become operative? The plan would pay 85% of his loss of wages—indefinitely, so long as he could successfully claim disability. The benefits he would receive under his employer's salary continuation plan would be additive—and thus he would be receiving tax free income greater than his gross earnings. There is a strong incentive for this individual not to return to work in two weeks. No adjustment was made in the AIA's Claim Study to allow for potential malingering under disability benefits. In addition, the duplication of coverages would add to claim costs.

There are many other examples of basic elements that would have to be considered but have not been included in the AIA's cost study. For a more detailed listing of such elements, we are enclosing a copy of the Defense Research Institute's booklet entitled "An Analysis and Critique of an Automobile Insurance Proposal Prepared for Study and Comment by the American Insurance Association."

We would like to make one other point before responding specifically to the questions. We believe that there is value in the fault concept as a disciplinary force on a motorist to exercise caution and drive safely. Even though this is difficult to measure, we are sure it exists. Many traffic engineers and people who have done extensive research in this field have confirmed this thesis (see "Automobile Insurance Law—Engineering Appraisal" by Lawrence Lawton, Insurance Council Journal, July 1969, page 352, and "Automobile Accident Costs of Payments", Conrad, et al, page 92.) Conrad has said that the necessity of determining who is at fault operates as an aid of the function of traffic law enforcement and also aids in obtaining information about accidents. Some critics say that the existence of insurance insulates the motorist from the consequences of his own negligence and hence, there is a serious dilution of the current effect of fault. The authors cite no evidence to support this theory but readily admit that some deterrence is possible through merit rating. It is submitted that there definitely is a deterrence emanating from the present tort insurance system, not only from the merit rating plans of insurers but also from the incentives not to buy or drive a car where other forms of transportation are available because of the experience of certain classes of drivers. In other words, it is not only costs involved but also the repercussions of such actions which deter certain individuals from reckless and careless driving. We are certain that this deterrence was there even before the merit rating plans were developed. We are assured today that some teenagers are undoubtedly deterred from buying and operating both high-powered cars and cheap, unsafe cars, because of the cost of liability insurance under the present system and because of the fact that they will be held liable for their accidents. In addition, parents of teenage drivers probably are given some motivation for restricting the use of the family car by their teenage children for the same fault—premium penalty reasons. They are also motivated to require their children to take driver education courses for the insurance cost savings and for the protection of their children's lives. In these and other ways the tort system is valuable as a disciplinary force, even if most losses are paid through liability insurance.

Having set forth the foregoing observations, we will turn to the questions asked.

A. RATING

Assuming the adoption of a non-fault compensation plan:

A. 1. *What would be the expected effects, if any, upon territorial price levels and differentials?*

We interpret this question as being directed primarily to the issues of whether the prices of auto insurance for the urban areas would increase or decrease

relative to those of the non-urban areas if a non-fault plan were to replace the present system. (For the purpose of these comments, we can beg the question as to whether the over-all price levels would increase in states where such a plan were introduced—although from our comments in other sections, we are confident that they would.)

Before addressing ourselves to the specific question, it might be helpful to explain why we have different territorial prices today—and how these are determined. Clearly, accident frequencies vary greatly by geographic areas—being greatest in the congested city areas and the smallest in the rural areas. So also does the costs of claims vary. The costs of medical services are greater in the cities—as are the costs of auto repairs. Average incomes are also greater in the cities. “Claims consciousness” is also greater in the cities, due to the ready availability of legal counsel and medical service—and to the greater awareness of the public to their opportunities to receive compensation in the event of an accident. It is probably fair to say that jury awards also tend to be somewhat more generous.

There are also differences in the nature of accidents that occur in the rural areas as compared to the non-rural areas. For example, there is more high-speed driving in the rural areas—resulting in a higher proportion of single-car accidents which are of greater average severity. Conversely, the frequency of property damage accidents is greater in the city—and, proportionately, more of these involve “minor” damages resulting from collisions at low speeds. (These “minor” damages frequently involve claims for “major” amounts of dollars of repair.) Obviously, there are more accidents involving pedestrians in the cities—as well as proportionately more “hit and run” accidents. Another major difference also exists in the crime rates and acts of theft and vandalism.

Because of the foregoing substantial differences in the underlying costs of accidents, equity requires that the premium vary by territory. This is achieved by charging the costs of a claim to the territory in which the owner of the car resides. For example, if a resident of Pekin, Illinois, is found liable for an accident for which he is responsible in Chicago, his liability claim is charged back to the Pekin territory.

In the absence of actual statistics compiled under a non-fault plan, we can only make an educated estimate as to what would happen to the *relative* costs of urban versus non-urban areas. One factor that would have a bearing is the present practice of charging a liability claim back to the territory of residence where the driver of a non-urban area causes an accident in an urban territory—and vice-versa. Under a “no-fault” plan the claim costs would probably remain in the territory where the accident occurred. We believe that the “net flow” of the charge for claim payments presently is from the urban to the non-urban territories—that is, that the dollars of liability payments incurred by the residents of the non-urban areas in the congested cities is presently greater than that of the residents of the city incurred in the non-urban territories. This would result in a higher relative cost for the cities under a “non-fault” plan.

But a factor that would probably prove to be of more importance is the greater “claim consciousness” that exists in the urban areas. Currently this is evidenced by the fact that the proportion of average bodily injury claim payment that is made for “general damages” (e.g., for pain and suffering) is higher in the urban areas. Since payments for “general damages” would be eliminated (or greatly decreased) under a “non-fault” plan, this would have the *initial* effect of decreasing the relative costs for urban versus non-urban areas.

However, we believe that the “claim consciousness” in the urban areas would soon manifest itself. As the residents of the urban area became aware of the opportunity to claim benefits under a non-fault “accident and sickness” type of coverage, they would begin to take greater advantage of their opportunity to collect benefits. They would also be assisted in these endeavors by the greater opportunity to seek advice of legal counsel and to avail themselves of medical services. We believe that it is inevitable that the long-range effect would be a more rapid increase in claim costs in the urban areas under a non-fault system as compared to the costs in the non-urban areas.

As stated previously, it is very difficult to give a precise answer as to what would happen to the relative costs of urban versus non-urban areas if a non-fault system were to replace the present one. In our best judgment, the initial net effect would probably be no significant change over the present “territorial relativities”. However, we believe that the longer-range effect would be for the “territorial relativities” for the urban areas to increase.

A. 2 and 3. What would be the expected effects, if any, upon age/sex/marital status and car usage price levels and differentials?

At the present time, once a territory's overall auto insurance bill has been determined, the cost is divided among all insured car owners in the territory. It is not divided equally or, in other words, everyone is not charged the same rate, nor does the public want everyone to be charged the same rate. Every survey which has been conducted so far, including one recently made by State Farm Mutual Automobile Insurance Company, indicates that the public feels it would be unfair for everyone to pay the same price for automobile insurance. If more detailed information on this survey would be helpful, please consult the testimony of Mr. Thomas Morrill given on December 8, 1969, before the Senate Subcommittee on Antitrust and Monopoly.

As a practical matter, because of the competitive environment in which automobile insurers operate, single classification system would simply not work under either system. In any such competitive situation, companies would soon concentrate on the business which is over-priced and shun the business which is under-priced. No company could afford, without substantial subsidy, to insure those risks with higher loss potentials. Today each motorist's loss potential determines the rating class to which he is assigned. This varies according to certain factors which have over the years been determined and applied to the rate making process. Again, as in the case of question 1, our answer relates only to the expected impact on rate differentials on a "no-fault" plan. At the present time the facts that are used to reflect these loss potentials are enumerated in your question. If we were to begin with the present classification system and convert the tort system to a "no fault" system, we feel that there would be an immediate increase in the number of classes. We would also anticipate that the current class differential would become smaller. This would come about for two principal reasons. First the spread between the claim frequency by class would decrease. Thus, many of the liability claims currently being charged against the youthful risk (or any relatively high accident-prone risk) would, under a "no-fault" system, be charged against the adult third party (or low accident-prone risk since the youthful risk tends to be at fault more often than the adult risk. The opposite situation would also exist since some of the "at fault" accidents are charged to the adult but, the two do not balance. The second factor contributing to a diminishing of the class differentials is that we could expect the (personal injury) claim costs to be lower for the youthful principal operators than for the typical adult, family risk—because of the generally lower income and smaller number of car occupants.

We would also expect that under a "no-fault" plan, the importance of certain loss factors will change. For example, occupation would probably become a significant factor. At the present time under a loss of income disability policy, this is one of the most significant rating considerations. A recent New York study shows a lower frequency of deaths and serious injuries in the heavier, better constructed cars. This study also shows that the occupants of a "compact" or station wagon are more susceptible to severe injury than are occupants of a sedan. Furthermore, under a "no-fault" system, the seating capacity of the vehicle could become a rate making factor.

Considering these factors and the possible off-setting effects of each, it is conceivable that a low income laborer with a large family and with an older, inexpensive station wagon, could pay more than a higher income young driver with a high priced, two-seater vehicle, even though the latter driver may represent 3 or 4 times the safety factor on the highway.

In summary, the present system tries to distribute the insured accident costs on an equitable basis to those individuals who are most likely to cause the largest number and the most serious accidents. In our judgment, the economic impact for payment of such losses *should* fall most heavily on those who cause the most accidents. Furthermore, we believe this is what the public wants and demands of the insurance industry. Under a "no-fault" plan, we feel that frequency will still be important but cost or severity will become more significant. We suspect that this will increase because of the lack of restraint of the fault system. The restraint of the present system has been explained more fully in the preamble to these questions.

A. 4. What would be the expected effects, if any, upon price levels and differentials associated with other current rating factors such as safe driver discounts?

Other significant factors in a motorist's loss potential are his driving and accident records. This is taken into consideration in the present rating system

by what is known as a "Safe Driver Insurance Plan." Under such a plan, a motorist free of accidents and convictions for serious traffic violations (most plans today only charge for accidents but a few still have a traffic violation factor), pays a lower rate than a motorist with a record of accidents or convictions. This is again consistent with the principle of making a motorist pay a rate that reflects his loss potential in relationship to the loss potentials of other insured motorists. Again, surveys show that this is what the driving public wants.

We would expect that under a "no-fault" system, that the Safe Driver Insurance Plan would completely disappear. At the present time, Safe Driver Insurance Plans which assign points for accidents try to restrict surcharges to "at fault" accidents. Under a "no-fault" plan, there would be no way of applying surcharges solely to accidents in which the insured was at fault or presumably at fault because fault would no longer be determined. To surcharge motorists solely because of accident involvement without determination of fault would prove, in our judgment, unacceptable to the public from a long-range standpoint. At the present time a majority of drivers are rewarded for their good driving and accident-free records. It is very difficult to conceive of an equitable safe driving plan that will reward the good drivers under a "no-fault" system. A Safe Driver Insurance Plan based only on traffic violations or accident involvement, would be replete with enforcement problems as is evidenced by the present trend to "accident only" Safe Driver Insurance plans.

We would also expect the current discounts for such factors as multiple car, driver training, and good student to decrease under a "no-fault system". Many of the reasons for this were outlined in our response to question A-2.

A. 5. *What new considerations might be applied in the development of rating classifications?*

The answers to the preceding questions were based largely on the premise that the current territories and classifications would be used, at least initially, under a "no-fault" system. Eventually, however, we expect that the rating system would be changed substantially.

As we indicated, at the present time territory boundaries are determined by various considerations that relate primarily to accident frequency, traffic patterns and control, population density, relationship of employment centers to residential, and growth potential. Under a "no-fault" system, these would continue to be important but other factors relating to the claim costs would take on much more significance—for example, income levels and costs of services. These additional factors will most likely result in changes in current boundary lines and very possibly, in completely new territories.

We would also anticipate several changes in the classification plan. The present plans like territory definitions, are based on accident potential. Under a "no-fault" system, other factors relating to economic status, family size, size and make of the vehicle, weight, year, and model of the vehicle (station wagon versus two-seater sedan), could become rate making factors. Classification plans would, undoubtedly, be expanded or changed to include these considerations.

In summary, we feel it is important to look at the overall effect of changing to a "no-fault" system. The only purpose of a rating and classification plan is to distribute the costs of that system on some equitable basis to the purchaser of the product. The total cost of the system can be distributed in many different ways. As long as competition exists, innovation plans will continue to be developed under which the person who costs the least will be charged the lowest premium.

The proponents of a "no-fault" system have placed most of their emphasis on the substantial premium savings that they allege will emanate from the adoption of the plan. As shown in the preamble to these questions, we believe any rating or classification system developed for a "no-fault" plan will have to distribute a larger cost burden to the insured motoring public.

B. UNDERWRITING

Preliminary to discussion of specific underwriting considerations some general statements on the underwriting operational function and practices are required. Much of the literature referring to "underwriting" has oversimplified a complex function and has assumed that there exists "standard underwriting practice" and "standard underwriting procedures." The truth is that underwriting practices vary by company, by state or territory, and over time. Underwriting is essentially a fitting or selection process; it attempts to select that group of

consumers whose loss potential fits within the exposure contemplated in the rates filed and approved for that company. The parameters of the selection process in any one company at any one time are dictated by a complexity of internal and external factors—for example, the company type, the character and quality of its administration, the financial condition and aims of the company, the breadth or narrowness of the type of consumer the company has elected or is capable of serving, the adequacy of the feasible rate levels for the markets served or selected, legislative and regulatory restrictions on the selection process, the pricing, underwriting and marketing practices of competitors for that market, the willingness and ability of management to subsidize or support social, economic or political needs or aims with respect to its market or the total market or new markets and the willingness and ability of management to continue to employ its resources in the industry.

For general discussion purposes it can be conceded that, with respect to a significant number of companies who under a "non-fault" enactment will continue to compete for the private passenger market, there are some common underwriting norms of acceptability and desirability.

Fault system underwriting norms

"Desirable risks" are those better than average risks sought and especially prospected for, acceptable risks are the mass of average and less than average risks willingly written and generally prospected for today. These two categories represent upwards of 95% of the insurance industry's automobile liability insurance customers.

At the present time norms of desirability and acceptability are applied to areas, groups and individuals on the basis of objective criteria of accident frequency and loss severity. Very simply accident frequency times loss severity equal total losses paid. Often the paid total is stated in relation to premium as the "loss ratio" but, a new system will require in-depth re-evaluation of the weight to be given to each of the three components of that ratio relative to changed risk and area characteristics in order to develop new underwriting selection guidelines.

Under the present system, since severity is primarily determined by the "unrelated" persons injured and the loss characteristics of such persons are for the most part random in relation to the "related" insured (roughly 70% to 80% of losses are paid to "unrelated" third parties—driver and passenger of other vehicles and pedestrians), the severity factor is the secondary factor usually considered as an average loss cost for the group or area initially evaluated. The adequacy of premium is the third consideration for selectivity purposes.

"No-fault" system underwriting norms

Initially, under a "no-fault" system, we suspect that underwriting generally would tend to be conservative and apprehensive because of the lack of reliable experience for establishing acceptability standards.

All companies may have to be conservative during this transitional period to protect their surplus and capacity.

Underwriting norms of frequency and severity will have to be revised to fit the new situation.

Accident frequency per automobile will in our judgment increase under a "no fault" plan because of the elimination of the deterrent factors contained in the present system. The reasons for this have been explained in the preamble and in earlier questions. We also feel that fraudulent and "staged" claims would increase the frequency. Reasons for this are explained in our answers to other questions.

"Accident frequency" as a norm would have to be revised to a more refined "claim frequency" measure. "At fault" persons now excluded by liability laws will become claimants. While there are now a significant number of "related" passenger claims this number is limited by "fault" rules with respect to the added degree of negligence required for suit and recovery by "guests". Each automobile occupant will under a "no-fault" system be a potential claimant in event of an accident. Additional injury and claim potential factors will assume increased pertinence e.g., type of automobile, passenger capacity, passenger protection devices, average passenger load, regularity of full passenger load, etc.

"Accident loss severity" as a norm of selection will take on a new and dominant aspect and similarly will require a great deal of judgment and experience

refinement in development and use. Broad averages for a state or territory or class will no longer be adequate tools. New and multiplied measurements of "claim severity" must and will be developed to reflect areas and classes of average income, average cost of medical services, availability and cost of rehabilitation services, average statutory benefit offsets, to name a few. Experienced claimsmen in a given area will have to be consulted for their intimate knowledge of supply and grade of medical services and facilities. Area economic conditions will have to be considered including those known to have a bearing on increase in questionable claims and malingering.

B-1. "Assuming the adoption of a non-fault compensation plan, who would be a preferred risk, a standard risk, a substandard risk?" (In terms of objective characteristics such as age, sex, marital status, driving record, etc. and subjective characteristics such as moral hazards, moral problems, credit rating, etc.)

These are really relative terms for within any class, depending on rate adequacy—you could find all three. As already stated, "preferred," "standard" and "substandard" classifications vary by company, area, and time.

The preferred risk would be one with lower than average accident potential, claimant number potential, injury and degree of injury for claimant potential, medical cost and economic loss potential.

Conversely, the substandard risk will have a higher than average accident potential, claimant number potential, injury and degree of injury for claimant potential, medical cost and economic loss potential.

Factors such as speed at which the vehicle is normally driven, annual mileage, prior accident or conviction records, drinking habits, etc. will still largely determine the desirability of a risk. In addition to these determinative factors which are most important today, such elements as occupation, health condition, employment record, earnings and cost of services could affect a risk's acceptability under a "no-fault" system. These new factors may be predominant for some risks and may only act as a counterbalance for others.

A combination of adverse "class" characteristics and an adverse individual record would still result in undersirability to any company. In such cases the high degree of probability of even low cost accidents outweighs all other factors.

What is or isn't a preferred risk will ultimately depend upon the classification system developed and the adequacy of the price charged for these classifications. Every class will have better than average or poorer than average risks. This means that the factors not in the rating plan will be the most determinative.

B-2. Who would be difficult to insure voluntarily except at very high prices? (In terms of subjective and objective characteristics.)

Generally speaking, wherever there would be potential for payment to multiple claimants of medical expenses and maximum "work loss" for a significant period, insurance would be voluntarily provided only at relatively high prices. An example of such a risk would be a one-car (older station wagon), married couple both of whom are self-employed with a fluctuating income, a large number of dependents who regularly ride together on extended trips and live in a "high cost" medical and service area. The person with a questionable employment record or one who changes jobs frequently will also have difficulty because of the claim settlement problem of determining actual work loss and problem of rating such a risk. There may well be a "transient occupation" surcharge or some other type of surcharge for these risks. This category may well include the economic disadvantaged city dweller or the self-employed individual. Lack of security of a job or fluctuation of income will be important.

Under a "no-fault" system it would be more difficult to insure a person with a disability because of the chance for permanent and/or total disability or for a prolonged recovery period. This type of individual would have no problem under the present system unless the disability greatly affects his ability to drive.

B-3. Would the composition of the assigned risk pools be likely to change? (In terms of both subjective and objective characteristics.)

Changes in the composition of assigned or automobile insurance plan risks are impossible to predict. Numerous and complex interacting market factors affect their population and composition.

For example, inadequate price levels for certain classes in a conservative underwriting atmosphere will inevitably result in increased number of such classes being accommodated only by assignment.

As under the present system, the biggest determinant will be the rate adequacy for the above average risks.

C. MARKETING

Assuming the adoption of a non-fault compensation plan :

C-1. Would emphasis upon particular marketing techniques change?

The type of marketing techniques that would emerge if a "no-fault" plan were to become law is impossible to predict with any degree of confidence. It would depend on the specific type of plan that was adopted—and the extent that plans that were relatively compatible were adopted throughout the United States and Canada.

If a uniform "no-fault" plan were adopted throughout the United States and Canada, insurance companies that are not now eligible to write auto liability insurance but that are licensed to write accident and sickness insurance, might enter the market—especially the large mutual life insurance companies that are very active in the group accident and sickness field.

However, in our judgment, the most likely result is that those insurance companies which are presently serving the automobile insurance market will continue to be the major factors in the marketplace.

Even if there is no significant change in the identity of the companies that are serving the auto insurance market, it is very difficult to estimate what their reactions would be as they might be confronted with varying new schemes of auto insurance. As mentioned previously, some might well regard the type of plan contemplated in the Massachusetts proposal as being basically unsound, since those acquainted with the problems of the Accident and Health business might well regard it as a type of "unemployment insurance". In this event, some companies might decide to withdraw from the auto insurance market—at least until their concerns were satisfied.

Another major factor that would influence the actions of companies would be the average premium level at which a new plan is introduced. Despite the fact that the AIA has held forth major savings in average premiums for their plan, most of the automobile insurance companies do not share this conviction. To the extent that companies were to believe that the average rate levels for the new plan were grossly inadequate, they might also decide to withdraw temporarily from the market.

Let's assume that the average rate level for a new plan were deemed to be adequate by most companies. Even in this case, the reactions of individual companies would vary depending upon their evaluation of the soundness of the new pricing/classification systems. This evaluation would be especially important in the event that the plan were introduced with laws that severely restricted a company's ability to underwrite individual risks. A further consideration would be the company's evaluation of the likelihood of being able to obtain responsible rate regulation in the individual state. (The latter problem is further intensified by the fact that the costs of a new plan would be likely to increase rather substantially with time as the public became increasingly familiar with the opportunity to collect benefits under a new plan. A company that was very pessimistic about the opportunity of getting future rate increases might well be reluctant to continue in the market.)

C-2. Would the potential for group marketing be affected?

Our answer is "yes", but definitely *not* in the way that is probably anticipated by most individuals who are currently studying the auto insurance industry.

Of course, in saying that group marketing would be affected, we assume that some major legal and practical problems would have been solved. The laws of the various states have to be changed to permit the writing of a "true group" plan. Employers would have to be persuaded to bear a significant portion of the costs of their employees' group auto program. Also, the Federal Income Tax Law would probably have to be changed so as to allow the premiums paid by the employer on behalf of his employees as a non-taxable income to the latter.

Assuming the foregoing obstacles were overcome, it would then be possible to co-ordinate the "no-fault" first-party auto medical expense and wage loss coverages with the existing Group A & II coverages, thereby helping to solve the problem of duplication of coverages. We believe that this would offer an attractive marketing opportunity to those insurance companies which currently have on their books a volume of A & II policies covering employers with employees of, say 500 or more lives. (Of course, the insurance company would have to be able to accommodate any auto liability coverages that remain.) However, while the new plan might offer a marketing opportunity to some insurance companies, it would not have the result of making the group insurance technique applicable to the great majority of the individuals who need auto

insurance—that is, those employed by employers with less than 500 lives, the self-employed and the non-employed.

To appreciate the foregoing, it must be understood that the characteristics of auto insurance are substantially different from that found in group life and group health insurance. Group life insurance is intended to provide a basic floor of protection for the employees, with the amount of insurance being determined according to a set formula—for example, one or two times average yearly earnings. While the premium charged each employee is usually at the same rate, the premium charged the employer depends on the age distribution of his employees. (On new business the average premium is determined by use of an age distribution of the employees—with subsequent average premiums being determined on the experience of the group.) Most employees who are the heads of families find it necessary to supplement their group life insurance with policies of individual life insurance. Essentially, the same conditions exist with respect to group health insurance.

Another major characteristic of both group life and group health is that very few transactions are required to adjust the insurance programs of individual employees. There are such transactions in group life insurance as changes of designation of beneficiary—and in group health insurance changes may be made that reflect a change in the family status of the employee. However, a packaged group auto insurance policy would continuously require a substantial number of individual transactions with the employees—for example, with additional cars, changes of cars, changes of use of car, changes of family composition or age to the extent that the latter are reflected in the charges to the employees themselves. Thus, some of the efficiencies that are obtainable in the group life and health fields would not be obtained through a group auto plan.

However, a far more important difference between group life and group health on the one hand and group auto on the other—is that for the latter both the insurance needs and the cost of insurance particularly the property damage coverage would vary greatly among the employees. The coverages needed by an individual employee would depend upon the number of automobiles in the family and the age and cost of such automobiles. The premium applicable to such coverages would vary greatly among the employees depending upon factors such as the age and sex of the members of the family, the types of cars in the family, and the accident and driving records of the members of the family.

Group life and health insurance has been successful only because the "law of large numbers" has been allowed to operate. With group life and health insurance, as the size of the group involved becomes smaller, special underwriting and coverage limitations have to be imposed. For example, in "Baby Group"—say less than 25 employees—the amounts of coverages are generally less generous than those made to larger groups—and, frequently, varying degrees of evidence of insurability are required.

Because of the substantial differences among employees in the types and amounts of coverages needed—and also in the underlying costs for such insurance—group auto would prove to be successful for only relatively large cases, say 500 lives or more. (Of course, the employer would have to make a substantial contribution towards the over-all cost of the program—or the program would not be attractive to those whose coverage needs are relatively small or whose underlying costs are favorable.) As has been the case with group life and health, the smaller the size of the group, the more restrictive would have to be the underwriting and the coverage provided with the remaining needs being served by means of individual auto policies.

Perhaps the most important point that arises from the foregoing is the fact group auto would *not* serve to solve the market problems for the great majority of those who now find it difficult to obtain auto insurance. As a rough guess, we estimate that at the maximum, only about 25% of those who need auto insurance could be handled through a group auto technique.

Even though Professor Bernard Webb in his excellent treatise on "Collective Merchandising" estimates that "approximately one-half of the population probably is beyond the reach of group merchandising",¹ we feel that this estimate is somewhat generous. Even if we assumed his estimate to be correct, this means that nearly one-half of the insurance buying public would be in the residual

¹ Webb, Bernard L., "Mass (collective) Merchandising of Automobile Insurance," p. 182.

market under such a plan. Today there is approximately 5% in this hard to place market.

We therefore conclude that under a group, "no-fault" plan, the average, young people employed in small employments, self-employed economic disadvantaged and transient employee, will have problems obtaining reasonably priced insurance protection. In fact, they may have more problems because the distribution systems will be geared to soliciting the large group contracts rather than the small group or individual policies of the individual market.

We would like to make one other comment in closing. Professor Webb in his statement before the Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary based part of his estimates of the potential of group auto on the types of compensation system that would be in effect for automobile insurance.² However, in his more detailed report published in 1969, we can find no reference to the potential growth of group auto under a "no-responsibility" system. His only reference concerns his belief that such a system would result in premium increases as opposed to the alleged premium savings.

D. On the basis of experience with present first-party coverages, what can be inferred about price differentials and availability limitations under a full non-fault plan?

This question is difficult to answer since we are uncertain as to the type of first-party coverages you are referring to in the question (auto, first-party coverages, or A & H coverages.)

We feel that very little, if anything can be inferred from the experience on the present first-party auto coverage—for the simple reason that these coverages are part of, and not independent from the present system.

For example, the indicated class differentials for the present collision coverage are very similar to those used for property damage liability. To conclude that the same differentials would be applicable to the collision coverage required under a "no-fault" system is clearly erroneous.

In similar vein, the indicated differentials by territory for the medical payments coverage are smaller than for bodily injury liability. However, we would not expect this to be the case for the personal protection coverage under a "no-fault" system.

We believe the substance of this question as it relates to A & H coverages has been covered in previous questions.

Mr. CLAYMAN. Even if no-fault is adopted by the Federal Government, and it should be, will it bring about truly inexpensive auto insurance for the average motorist? We can see where there would be lower claims-administration costs, and an overall better distribution of present premium dollars—that is, more money available to claimants through the removal of most legal costs and shifting funds from overcompensated to undercompensated. But we cannot see how other wasteful insurance company overhead and selling costs are going to be significantly reduced by implementing no-fault through private insurance carriers. Group auto insurance may be of some help. However, that's going to be a long time coming. And, if group auto insurance is established, there still will be a large segment of the motoring public not in groups looking for individual policies. As we are finding with Blue Cross and the private health insurers, the groups will enjoy lower rates at the expense of the individual policyholders. These policyholders may even be in companies—like the health insurers selling single policies today—who eat up 50 percent of every premium dollar.

Now, if I may, not that I want to behave like a college professor, but simply to indicate these facts to you. Seeing this chart may make it more impressive, seeing or hearing, and it is the kind of information that will be presented to our own membership. This chart (see p. 692) indicates that \$14 billion in premiums are paid in yearly

² Webb, Bernard L., "Collective Merchandising of Automobile Insurance" (Washington, D.C., July 17, 1968), p. 13.

AUTO INSURANCE PREMIUMS AND PAY-OUT - 1970
TOTAL PREMIUMS \$14,000, 000,000.

FOR
PERSONAL INJURY
LIABILITY CLAIMS

PREMIUMS

INSURANCE
OVERHEAD AND PROFIT

\$6,000,000,000. \longrightarrow \$2,700,000,000.

FOR CLAIMANTS

LAWYERS

\$3,300,000,000. \longrightarrow \$900,000,000.

NET TO CLAIMANTS

\$2,400,000,000.

SOURCE: U.S. Senate Antitrust and
Monopoly Subcommittee.

for automobile insurance pensions, expenses and payouts, and this was for the year 1970. For personal injury and liability claims—the very problem you are discussing here—they pay in billions in premiums and insurance. Overhead and profit is \$2,700 million; and claimants, \$3,300 million; and the lawyers, \$900 million. And that leaves a net to claimant of \$2,400 million.

In this area you are talking about, incidentally—personal injuries—there is the smallest proportion of the premium dollar going back to the claimants. As you notice, this indicates that only 40 cents out of every premium dollar ultimately goes back to the claimant. These figures are based on the Senate hearings.

The next chart (see p. 693) deals, of course, with an area that you are not concerned with immediately, but I think it is part of the total picture. Again, this is for damages to cars and property of others, and policyholders; that is, the other fellow's car. Premiums are \$3 billion, and insurance is \$1,000,300,000, claimants got \$1,000,700,000; and lawyers got \$100 million, leaving a net in amount of \$1,600 million to claimants.

In this case the picture gets a little better: 53 percent, or 53 cents of every premium dollar, ultimately finds its way back to claimants.

AUTO INSURANCE PREMIUMS AND PAY-OUT - 1970
TOTAL PREMIUMS \$14,000,000,000.

FOR DAMAGE TO CARS AND PROPERTY OF OTHERS (LIABILITY):

<u>PREMIUMS</u>		<u>INSURANCE OVERHEAD AND PROFIT</u>	
\$3,000,000,000.	—————→	\$1,300,000,000.	
<u>FOR CLAIMANT</u>		<u>LAWYERS</u>	<u>NET TO CLAIMANTS</u>
\$1,700,000,000.	—————→	\$100,000,000.	\$1,600,000,000.

POLICYHOLDERS' OWN COLLISION AND COMPREHENSIVE:

<u>PREMIUMS</u>		<u>INSURANCE OVERHEAD AND PROFIT</u>	<u>NET TO POLICYHOLDERS</u>
\$5,000,000,000.	—————→	\$2,000,000,000.	\$3,000,000,000.

SOURCE: U.S. Senate Antitrust and
Monopoly Subcommittee.

So, obviously, you are dealing with the most grievous problem of them all. But this picture is hardly a pretty one.

Here, we have a chart (see above) of the policyholders' own collision and comprehensive, and premiums are \$5 billion and overhead and insurance is \$2 billion, and net to the policyholders is \$3 billion. And here 60 cents of every premium dollar ultimately finds its way back to the policyholder.

Now, then, all of these are charts which are simple, obviously, and all these charts demonstrate graphically, at least to me, is that 50 cents of every dollar goes into other facets of insurance than paying the claimant for his loss.

I want to make the case that any industry that has this kind of overload on overhead, much of it not particularly serving a great soulful purpose, needs the closest scrutiny of all of us in the paying public. That is what led me to surmise that perhaps even your bill does not get to the basic heart of the problem. Because, obviously, you are still going to use the private-insurance institutions.

Now, maybe it may very well be this is the best that can be achieved politically, and I understand that. But if that is the fact—and it may very well be the fact—some of us, some of you ought to be thinking, it seems to me—and forgive me for sounding like I know more than I do about it—ought to be thinking beyond the specific bill.

What can be done to reduce drastically the \$5.8 billion in administrative expenses, of which \$2.5 billion is selling cost? How can we expect to have real savings unless some administrative system is

devised along the lines of a Government insurance program? This would be, frankly, our objective in the long run.

There were some 99 million motor vehicles registered in the United States in 1967. If we had charged each vehicle \$100 that year for unlimited personal injury and property damage insurance under a Government auto insurance program, we could have paid all injury and fatality, medical and lost incomes of \$5.7 billion, three-fourths of the \$4.8 billion in property damage loss, and if we had spent around the same for administrative expenses as we did for social security disability insurance, we would have had a few hundred million dollars left over.

The loss data for 1967 is from table 2 on page 6 of the DOT final report.

After reviewing these figures, aren't we really being conservative in urging you to pass H.R. 7514 with surcharge controls on the private carriers?

The long-suffering public, we repeat, shouldn't be asked to accept anything less.

That, Mr. Chairman, and members of the committee, is the sum total of our evidence.

Mr. Moss. Thank you, Mr. Clayman.

Mr. Broyhill?

Mr. BROYHILL. No questions.

Mr. Moss. Mr. Eckhardt?

Mr. ECKHARDT. Mr. Clayman, I think your charts are most interesting. In calculating percentages, it would indicate that, of the insurance dollar, 40 cents of the insurance-premium dollar is paid out to the claimants and 45 cents is retained for the company for its various overhead charges and profits, and 15 cents is paid for legal fees.

I have made a calculation from table 21 on page 49 of the Motor Vehicle Crash Losses and Their Compensation in the United States and I want to somewhat correct some of my questions the other day. Because I think I used the table as if it were the total figure. I think what may be derived from it here may correct any misunderstanding.

Now, this table indicates that 36 percent of the estimated automobile liability insurance operating expenses is spent for insurers' sales expenses, a matter you have mentioned in your testimony. And using your figures here of 36 percent of \$2,700 million, that would be \$872 million, or approximately 15 cents out of that total premium dollar. So breaking down the 40 percent, you could get a new set of figures which would indicate that 15 cents out of the premium dollar goes for advertising; that it is for the sales costs, various means of promoting sales, and about the same amount to claimants' lawyers.

Now, a slightly lesser amount, if one looks at these figures, goes to the insurance claims expenses. That is, the insurers' attorneys' fees, other litigation expenses, and other loss adjustments expenses, which, in the figures I have here, indicate about \$960 million.

So, roughly, you are getting three items out of the claimants' dollar of about equal magnitude, the cost of plaintiffs' lawyers, cost to defendants' lawyers, cost to the insurer for the advertising and sales, each of which is around in the neighborhood of 15 percent, or rather 15 cents out of the premium dollar. And then another 5 percent for

other overhead and profit. And then the remaining is 40 percent for claims.

Now, I think this certainly does bear out your statement that something more than what we have done here must be done with respect to the overhead cost of insurance. Do you not agree?

Mr. CLAYMAN. Yes, sir; I agree thoroughly with your expression of the facts and your conclusion.

I think, normally in most of our activities, economic activities, social practices, that if we discovered that there was a 60-percent slough-off in the public payments we would raise holy hob. We would be distressed, the public would be distressed. As a matter of fact, if the public comprehended—and the question is, will they? But if the public did comprehend these statistics there will be a political uprising.

Mr. ECKHARDT. The thing that concerns me, too, about these figures is that we are talking largely about what constitutes virtually compulsory liability insurance. Because some States require liability coverages and others make it so risky not to have it as to make it virtually required; as, for instance, in my State of Texas.

In effect, we remove the necessity for any kind of advertising or sales pressure. We further establish somewhat uniform policies in some States and yet, according to the figures I have derived here, there is as much overhead cost spent for the purpose of promoting and selling insurance as there is for either the plaintiffs' lawyers' costs or for the defendants' lawyers' costs.

If we pass this bill and provide for no-fault insurance, I think we would approach even greater uniformity and even more compulsion to be covered.

Can you see any reason why there should not be some manner of assurance by governmental action that the sales costs would be drastically reduced under such a plan?

Mr. CLAYMAN. What you are saying makes sense to me.

Mr. ECKHARDT. We have testimony here through the representatives of the National Insurance Co. concerning how well the Puerto Rican plan works, but I understand that plan is governmentally conducted; that is, the insurance is covered by governmental financing. Do you understand that to be the case?

Mr. CLAYMAN. We have, if I may use an analogy, we have some experience in this country with the very problem or question you are raising. I am talking about workmen's compensation. We have a few exclusive State funds, as perhaps you know, maybe half a dozen. They got started and originally they never grew because the insurance companies had the political power to prevent them from growing.

But where they are located—for instance, a very conservative State like Ohio, where they started out with an exclusive State fund and it became so encrusted in tradition that no one dared to lay their vulgar political hands on it, they eliminated all of the unnecessary costs, the acquisition of business, which at least as of a few years ago when I looked at the subject—and I have not looked at it for some time and maybe it has changed a bit and maybe has gone up or down a percentage point—but the acquisition cost was 17 percent or 17 cents of every dollar that went into the acquisition of business.

Now you have to remember in the States that have workmen's compensation—and they all do—everybody has it, every employer has to

have some kind of coverage, and only the very largest are self-insurers, where they permit self-insurance. So there is no competition or their competition is simply between—the wasteful competition between competing institutions that give exactly the same service.

Mr. ECKHARDT. They have a built-in market, a guaranteed market?

Mr. CLAYMAN. Yes. Now obviously there is a real dogfight going on between the various companies in search of the same business. But they all offer the same, or pretty much the same, service because most of them are required by law. So in Ohio, to come back to the basic point, you have a State fund which is exclusive with the costs, and now this is from memory, I could be off a point or two, costs about 6, 7, or 8 cents at the most.

Mr. ECKHARDT. Reduced from about 17 cents; is that right?

Mr. CLAYMAN. No. The whole business, the whole cost roughly in that area of opting workmen's compensation, roughly, and I could be off a point or two, as against what? Forty cents or 45 cents.

Mr. ECKHARDT. I see.

Mr. CLAYMAN. That is in most of the States of the Union that don't have that kind of exclusive State fund. Then you have this kind of experiment we have made in this country indicating the difference of costs where you have private insurance struggling for the same business and an exclusive State fund in a conservative State like the State of Ohio.

Incidentally, even the employers will not let the politicians touch that law in Ohio, because they are saving money, too. And our beef there has been that the savings have not gone back as much to the workers as to the employers, but it is a longstanding fight.

Mr. ECKHARDT. Of course, you point out the importance of reducing premium rates. I certainly do agree with you on that. There are as I understand several factors working in both directions under this bill or any no-fault insurance plan. No. 1, there will tend to be increased load due to payment of persons who would otherwise be excluded for fault. And we must offset this by efficiencies or by added efficiencies plus a reduction of a kind of equity to the claimant.

In other words, some of these plans eliminate such things as pain and suffering; I think most of them do. Some of them actually virtually negative most of the partial-permanent injury. And, of course, in that way premiums may be reduced, but it would seem to me that we should reduce premiums altogether through the means of increasing efficiencies in processing the plan rather than reducing the total equity; that is, the right to recover for actual losses, which to me include pain and suffering of the injured party.

What is your view?

Mr. CLAYMAN. My background years ago was in a State where I had some awareness of workmen's compensation. And, of course, in workmen's compensation laws, all of them I am aware of, there is payment for permanent-partial disability, payment also per se for pain and suffering; and anguish is not in the workmen's compensation laws of the country. But permanent-partial, which indeed may be an expression, in a good part, of pain and suffering is in the law. And I think our people would find it very difficult to comprehend a national act that would not consider that aspect of human suffering, human disability.

Now then, we gave up, as you know—the labor movement, rather, gave up, the workers gave up—the right to sue in courts in most States simply to get certainty. I think they would want certainty here. They would be willing to give up something for certainty, and for lower costs. I personally do not think, although I cannot say I have plumbed the depth of opinions, but I do not think it necessary to give up totally the aspect of workmen's compensation which includes permanent-partial disability.

Mr. ECKHARDT. Thank you, sir. And thank you, Mr. Chairman.

Mr. MOSS. Mr. Ware?

Mr. WARE. If I may make, Mr. Chairman, a few comments rather than questioning.

Mr. MOSS. Certainly.

Mr. WARE. I think some reference has been made to the Social Security System, and in some years of public office I have not kept records on this, but I can say with considerable certainty I received far more contacts—and I am not suggesting a few percent but some hundreds of percent—from constituents under the social security program as against those who have questions or problems with automobile insurance.

Now we can certainly reduce the costs of our automobile insurance if we are going to eliminate local insurance people, agencies owned, and so forth, where insurers can go to present their problems and get claims resolved. I think you can reach a point of: How far do you want to carry this? We could reduce costs. I am certain, if we had only one food chain operating in the District of Columbia. We could reduce selling costs of the newspaper business if we had one newspaper serving the District.

Then I think we have to recognize, too, when you eliminate competition, at least under the American economic system as I understand it from our history, we inadvertently eliminate some of the progress that has been made. Because the producer seeks to provide a better product or better service to attract the consumer, although I hasten to say the "better mousetrap" story has been overdone.

So I am not quarreling with the concept of no-fault insurance, but I just raised a question that I think this committee has to consider as to what degree do we want to advocate the replacement by Government of private enterprise in automobile insurance and in other areas.

Mr. MOSS. Did you want him to comment on it?

Mr. WARE. Yes, I will be glad to have a comment. This is more of a discourse than an argument.

Mr. CLAYMAN. Yes, I know, Congressman, and this is an understandable point of view. And over the years we have all had great debates on that very issue in our society.

I am for the private sector of our society doing everything it can do well, because I wouldn't want to see a society where the Government controlled every facet of our lives. It would be a pretty disagreeable kind of society.

I am inclined to believe my own statistics, the statistics also developed by others. I am afraid—and I am sure some of my insurance friends will be distressed with this—I am afraid they have demonstrated they have not been able to do the job adequately. Where the

social demands are big enough, strong enough, important enough—like, for instance, national health, health of our people, and it is not being done adequately and efficiently, or effectively, or justly, by the private enterprise sector, then government in one way or another is required to step in.

Now what I am saying is “old hat,” nothing new; and both of us are repeating the things that normally we stand for and believe, and you think you are right and I think I am right. The statistics, I have a feeling, demonstrate what I am saying is justified.

My final point, because you opened up an enormous Pandora’s box: I am an Ohian by background, so I know Ohio. I lived there for a good many years and I have been in the trade movement many years and in close contact with the State government, and I think I know its operation. At least it is 11 years and it has not changed much since. All of the arguments you suggest—and you understand and I understand—were made against the exclusive State fund in Ohio relating to workmen’s compensation. And the insurance people in effect said to the employers, because they knew they couldn’t influence trade union people, they made the case to employers and said, “Look, you fellows run counter to the basic American tradition of free enterprise.”

The employers, the biggest employers of Ohio, said, “No, we are going to stick.” Why did they say no? From their point of view it is cheaper, they are getting a bargain, you see. So, they found an exclusive State fund, which is a government-operated fund, there are no insurance companies in workmen’s compensation in Ohio. It made sense to them and the employers and none thinks of it as an ideological issue.

You must know that that State has a conservative background and has had, almost from beginning of time, a very conservative legislature. Once in a while, every once in a while, every 10 or 15 years there is some change, but a very conservative, long tradition. And there in Ohio they faced up to the point you made and said, in that situation the employers said and the conservative group politicians said, “Let’s not change it because it works.”

Mr. WARE. Yes, I was not taking issue with your chart or with what you said. I was raising this comment as to whether we cannot carry this same thinking not only to the State insurance fund in Ohio, but shall we make it a national affair.

Then our next area is making a few changes here, maybe we can take it into government; and it seems to be a most efficient quick-acting government then would be a dictatorship. And I think we have to draw a line somewhere between what we want in terms of efficiency and what you might regard, at least some regard—I don’t think you and I do—as progress. Maybe it is not germane, Mr. Chairman, to this question, but I thought I should state it.

Mr. MOSS. I think it is a very valid point and one which undoubtedly in further deliberations will have to be carefully looked at.

Mr. WARE. I am aware of the fact that many of my constituents are not happy with the difficulty they have had with resolving the problems with the Social Security System and it primarily stems from the fact that they have to travel some distance to consult, or to go to a social security office.

Mr. MOSS. Mr. McCollister?

Mr. McCOLLISTER. Mr. Chairman, a comment and then a question. The actions of this subcommittee have been concerned these past days with: How can the cost of liability insurance be reduced? How can claims be paid more quickly? How can equity be better provided for?

The contention is made that some form of Federal action here, even to the extent of completely federalizing the insurance industry, is suggested as an answer by which these goals could be achieved.

Yet, the papers are full of the concern of the Congress as to operation of various Federal agencies now involved in various actions on behalf of its citizens—operation of the Post Office, for example; the welfare establishment; Office of Economic Opportunity; defense establishment; social security, which Mr. Ware mentioned. And all of these have a very considerable part of their cost laid to administrative cost.

I think that it has yet to be proven that the private insurance industry is any more deficient in this regard than are these examples of where the Federal Government has any monopoly.

Relating, though, to your testimony, sir, I am wondering if AFL-CIO can demonstrate any lower administrative cost in those States where there is compulsory unionism, as opposed to those States where the right-to-work laws do exist?

Does the AFL-CIO spend any less money on organizing activities in those States, where organizing or where union membership is compulsory, than in those States where it is the right of the employee to make his own decision in that regard? Do you have any such statistics? It would seem to me that that would be appropriate to this question.

Mr. CLAYMAN. I don't have any statistics in front of me. I must confess I am struggling to find the significance of the analogy. I would appreciate help.

Mr. McCOLLISTER. Let me help. It is suggested with compulsory insurance in every State, not only no-fault, but the supervision that covers possible liability, where we exceed that threshold that we have by establishing the compulsory nature of the insurance, thereby, since everybody has to have insurance, there ought to be less money spent in acquisition of insurance.

I am wondering if that same example holds true in many, many activities. But in this case, since you are knowledgeable in the field of organized labor administration, I am wondering if you are able to show there is any less cost involved in organizing activities in those States where we have compulsory unionism, as opposed to those where we do not.

Mr. CLAYMAN. Specifically, I cannot give you those facts. I know, in our own department, we have some organization drives and they are in some of the Southern States, some of the Southwestern States, and we make a very serious contribution to the activities of the migrant workers, particularly in California, and also the Southwest, not because it means anything to us in an economic way in terms of the basic force of organized workers, but because of its, or the inherent need rather, for it.

So, we put money in unorganized States, organized States, areas where there will never be any return to the labor movement in terms of dues or anything of that sort. But I can't give you any specific figures.

Mr. McCOLLISTER. No further questions.

Mr. ECKHARDT. Mr. Chairman.

Mr. Moss. Mr. Eckhardt?

Mr. ECKHARDT. On this point, I think a comment is necessary. There is no State that has compulsory unionism. The Taft-Hartley law will not permit compulsory unionism. The only thing that is permitted is a type of union shop which requires a person, after a certain time in employment, in case of a vote of the majority of the employees in the unit, to join the union.

As I understand, there are very few, I think no State, in which there is not a very substantial number of persons who yet remain unorganized and no law compels them to be organized. Therefore, of course, in every State there is a wide opportunity to extend unionism by the expenditure of money.

On the other hand, the bill we are proposing here, as I understand it, would absolutely compel a person owning an automobile to pay into the plan.

Now there is no State in the United States, nor can there be a State, in which everyone who works must necessarily belong to a union.

Mr. CLAYMAN. That is right.

Mr. Moss. Are there any further questions?

All right, Mr. Clayman, I want to express the committee's appreciation for your appearance here today.

Thank you very much. I am sorry we were not able to take you yesterday afternoon.

Mr. CLAYMAN. No, Mr. Chairman, I understood you had a very thorough committee and there are a lot of questions that you asked and I didn't feel distressed, but was amazed at the thoroughness.

Mr. Moss. Thank you.

The next witnesses will be a group of four from the American Bar Association: Mr. Edward W. Kuhn, past president of the ABA from Memphis, Tenn.; John T. Reardon, judge, Circuit Court, Quincy, Ill.; Mr. Louis G. Davidson, past chairman of the American Bar Association Section of Insurance, Negligence and Compensation Law from Chicago, Ill.; and Thomas E. Deacy, Jr., from Kansas City, Mo.

I want to welcome you gentlemen here before the committee. Whoever is the spokesman for the group, I will turn the microphone over to you.

STATEMENT OF EDWARD W. KUHN, PAST PRESIDENT, AMERICAN BAR ASSOCIATION; ACCOMPANIED BY JUDGE JOHN T. REARDON, CIRCUIT COURT, QUINCY, ILL.; LOUIS G. DAVIDSON, PAST CHAIRMAN, ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW; AND THOMAS E. DEACY, JR.

Mr. KUHN. Mr. Chairman and members of the committee, we want to express our deep appreciation to all of you for permitting us to have our day in court and present our testimony here on the very vital problem you are considering.

You have introduced our panel, so I will eliminate the introduction I had prepared. This is Judge Reardon on my right of Quincy, Ill. He is the chief judge of the judicial circuit and immediate past chairman of the Conference of State Trial Judges. He is also the newly

appointed chairman of the Special Committee on Automobile Accident Insurance Legislation of the association.

I might say Mr. Davidson on my left here, a Chicago lawyer, is past chairman of our section of insurance, negligence, and compensation law, and Mr. Deacy, from Kansas City, is chairman of the Special Committee on Automobile Accident Reparation for the American College of Trial Lawyers and is representing the College of Trial Lawyers.

The American Bar Association is the largest legal organization in the world with a membership of 150,000 lawyers, judges, professors, and scholars. Its house of delegates is composed of 291 members and represents not only the American Bar Association, but because it contains representatives of the State bars, the large local bars, and approximately 20 affiliated legal organizations, it is broadly representative of the legal profession in the United States and is its national spokesman.

The association has a vital interest in H.R. 7514 and all other pending no-fault legislation. It has given the subject much attention and at its August 1969 annual convention in Dallas, Tex., approved report No. 18, the so-called Powers report. A copy of said report is attached hereto, and we ask that it be made part of the record.

Mr. Moss. Is there objection to the question?

Hearing none, the report will be received and made part of the record. (See p. 705.)

Mr. KUHN. It is a comprehensive treatment of the subject matter, compiled after 38 meetings of 2-day duration by a committee of lawyers and judges ably assisted by a commission composed of representatives from Government, the industry, law schools, and consumers.

The fundamental principle adopted by the house of delegates is as follows:

The present system for providing reparations for those injured in automobile accidents, based upon the concept that if there is no fault there is no liability and relying upon an adversary method of trial before a court or jury as the means of determining liability and the amount of damages, be retained as the basic legal structure for dealing with such cases but that the following proposals for further study, changes in, addition to and modifications of such system should be further considered . . .

The house of delegates adopted approximately 60 committee recommendations for improving the present tort system classified as follows:

- A. Recommendations regarding delay in the courts, 24 in number;
- B. Recommendations as to substantive law, seven in number;
- C. Recommendations as to the law of damages in automobile accident cases, four in number;
- D. Recommendations as to certain categories of persons who are injured in automobile accidents, three in number;
- E. Recommendations as to costs being eight in number;
- F. Recommendations as to automobile insurance, four in number;
- G. Recommendations as to the use of the tort law to deter dangerous driving, one in number;
- H. Recommendations as to the Cotter plan, eight in number;
- I. Recommendations as to highway safety, one in number.

A condensed copy of the recommendations as taken from the report is attached hereto and I would like this also to be made a part of the record.

Mr. Moss. Is there objection to the request at this point?

It will also be made a part of the record and the record will show both items accepted will be included in the record following the verbal testimony of the witness. (See p. 968.)

Mr. KUHN. Also attached is a copy of an article written by Franklin J. Marryott, retired general counsel of Liberty Mutual Fire Insurance Co., and the reporter for the Powers Committee, which sets forth the position of the American Bar Association which I would like to have made a part of the record.

Mr. Moss. Any objection?

Hearing none, it will also be included with the other items entered in the record. (See p. 980.)

Mr. KUHN. In view of the limited time, I hope to take only 10 minutes and my colleagues will take the balance of about 10 minutes each, with your permission.

Mr. Moss. Yes.

Mr. KUHN. I am not going into the specific recommendations we know as the lawyer's plan for solving this problem, and neither is it my intention to cover the approximately 100 plans that are now in existence on no-fault insurance.

My general objection to all no-fault plans is that there is no great demand by the general public for a change. The surveys—I might say that none of these surveys were instigated, instituted, conducted or brought by, or promulgated by, the legal profession—conducted by the Pennsylvania Chamber of Commerce, Market Facts, Inc., the State Farm Mutual Insurance Co., insurance agents; Drake University, the University of Michigan, the Minneapolis Tribune; and even the Department of Transportation, indicate that the majority of the public are satisfied with the present system.

I might say the survey taken by State Farm Mutual of its policyholders shows 93 percent satisfied with the present system. As I say, gentlemen, none of the surveys were conducted by the legal profession and we think that is an answer to those who would say that the lawyer is simply interested for economic reasons.

My specific objection to these no-fault plans is that they are asking the injured person to give up his claim for pain and suffering, loss of life's pleasures, inconvenience, future impairment of earning capacity, disfigurement, loss of limbs, sight, hearing, consortium, prenatal injuries, impotency, right to catastrophic losses and many other losses in return for a certainty of payment of his medical and hospital bills and some loss of earnings. They discriminate against the housewife, the minor, the elderly, the disabled, the unemployed, the married man with a large family, and many other segments of our population.

I am opposed to depriving the union men and the laborers, and those who have provided their own health and accident protection, of their collateral benefits because many of these plans would limit recovery by the amount of available collateral benefits.

I am opposed to forcing people to purchase two types of policies—no-fault and present policies.

There is no proven certainty that costs to the premium-paying public will be lowered. There are many claims but the actuaries are in fundamental disagreement. Many eminent statisticians contend that costs will increase under a no-fault plan and you will find that

material in our report. And if we go to a no-fault plan it is going to be extremely difficult to return to the present system.

A no-fault plan will have a great impact upon the industry itself. Under some of these plans the highly competitive and efficient small and medium-sized auto insurance writers will be doomed to extinction because only the giants are equipped to withstand the rating uncertainties, administrative costs, and retraining of personnel.

The adoption of these plans will ultimately lead to Federal takeover of the automobile insurance industry. They will injure the deterrence factor and increase careless driving. They do violence to our traditional and moral belief that the negligent party should compensate the innocent victim of an accident. They should not be treated as equals.

We do not accept the contention that automobile cases are clogging the courts. Other types of cases are the main culprits. We do not believe that because auto cases require 11.4 percent of the judge's time in the Federal courts and 17 percent in the State courts the present system should be amputated. We do not believe that the juries are unable to determine fault.

The American Bar Association takes no position with reference to the three other insurance bills pending, viz: the group merchandising, the tax reductions, and the automobile safety bill. Although, of course, naturally we approve and support all types of highway safety measures.

It would be difficult for any lawyer to leave this subject without some comment that goes beyond the economic realities involved. The law and all those involved in it can view with reasonable pride the advances in individual rights which have been made in the last 20 years. That a correlative growth in individual responsibility is often lacking seems all too obvious. A large part of the American population has abandoned the belief that one is responsible in the next world for what he does here. We are now busy considering plans which will tell the same people that they aren't even responsible in this world for their acts.

All the present no-fault programs contemplate one further abandonment of individual responsibility. No one can with any degree of certainty calculate the effect of this upon the level of death and injury on the highway. I think it can be said with reasonable certainty, however, that a system which boldly proposes to reduce benefits to the innocent in order to compensate the person at fault is not likely to contribute to added safety on the highway. And quite apart from its immediate effects on life and limb, it strikes at the very core of the proposition that freedom is based upon individual responsibility.

When all is considered, the benefits to be received from any no-fault plan are wholly illusory. And the losses such a plan would bring are too high a price to pay for an experiment the public doesn't want anyway.

That completes my statement, Mr. Chairman, and I would like to ask that it be made part of the record.

Mr. Moss. Have you summarized?

Mr. KUH. I have given it pretty well verbatim.

Mr. Moss. Then it is already in the record at this point.

(The ABA Report No. 18, the condensation of recommendations, and the article by Mr. Marryott referred to, follow:)

REPORT
of the American Bar Association
SPECIAL COMMITTEE ON
AUTOMOBILE ACCIDENT REPARATIONS



No resolution presented herein represents the policy of the Association until it shall have been approved by the House of Delegates. Informational reports, comments and supporting data are not approved by the House in its voting and represent only the views of the Section or Committee submitting them.

AMERICAN BAR ASSOCIATION
SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS

RECOMMENDATIONS

WHEREAS, on January 27, 1969, the Special Committee on Automobile Accident Reparations presented to the House of Delegates its report, which is described as No. 13 in the printed book of Committee and Section Reports; and

WHEREAS, said Committee's report recommended the adoption of four resolutions numbered I, II, III, and IV; and

WHEREAS, Resolution II was, at the time of presentation, amended in part; and

WHEREAS, all four resolutions, as amended, were adopted and approved in the following language, to-wit:

- I. The Special Committee on Automobile Accident Reparations be continued for the purpose of studying, evaluating, and reporting from time to time, on further proposals for changes in the system of providing reparations for those injured in automobile accidents.
- II. The present system for providing reparations for those injured in automobile accidents, based upon the concept that if there is no fault there is no liability and relying upon an adversary method of trial before a court or jury as the means of determining liability and the amount of damages, be retained as the basic legal structure for dealing with such cases but that the following proposals for further study, changes in, additions to, and modifications of such system should be further considered and a final report be submitted in time for distribution to the House 30 days before the Annual Meeting in Dallas.

(Following the above language, Recommendations A through I

with subsections, which were the subject of further study, were set forth.)

- III. Proposals that would severely reduce benefits payable to persons injured in automobile accidents or would abolish or substantially abolish the tort basis for the automobile accident reparations system, such as The Keeton-O'Connell Basic Protection Plan and the "Complete Automobile Protection Plan" announced by the American Insurance Association, be opposed.
- IV. Persons designated by the President of the American Bar Association be authorized to support the adoption of legislation consistent with these resolutions, and to oppose legislation inconsistent with these resolutions, before appropriate legislative bodies and other groups.

and

WHEREAS, the Committee has further studied the subjects assigned to it and has submitted its revised report to the members of the House of Delegates of the American Bar Association thirty days before the 1969 annual meeting in Dallas, Texas, all as required by Resolution II;

NOW, THEREFORE, BE IT RESOLVED, that the following further recommendations be adopted.

A. RECOMMENDATIONS REGARDING DELAY IN THE COURTS

WE RECOMMEND:

Page reference
to text

1. The adoption and implementation of a plan, by constitutional amendment if necessary, for a unified court system with power in one of the judges to assign other judges to judicial service so as to relieve court congestion and generally to utilize the available judges to best advantage. 34
2. That adequate judicial statistics be maintained. 35
3. That in jurisdictions having many courts, or in which a need has arisen from other causes, court administrators be appointed, responsible to the chief judge or to the administrative judge, for the performance of the administrative work of the courts. 35
4. That court administrators attempt to devise, or assist the court to devise, ways of scheduling cases for trial so as to maintain to the 35

maximum feasible degree, an uninterrupted flow of cases.	Page reference to text
5. Further efforts to assure that judges be selected on the basis of merit, including the adoption by state and local bar associations of by-law provisions defining the procedures for the participation of the association in the process of judicial selection.	24-37
6. The adoption of a plan or rule under which judges, as long as they perform their duties in a satisfactory manner, are assured of adequate pay, secure tenure in office until a stated retirement age, and retirement then under an adequate retirement plan.	37-39
7. The adoption of a plan or rule under which the lazy, incompetent, aged, ill or otherwise infirm judge can be retired or, if necessary, removed from the bench, under which judicial misconduct can be subjected to discipline, but which contains safeguards for the protection of the judge and those who complain about him.	37-39
8. That voluntary waivers of jury trials be encouraged and that plans such as the Los Angeles Plan, under which panels of judges who attract jury waived cases are utilized, be experimented with in other jurisdictions.	39-40
9. That measures be taken to streamline the selection of jury panels and to shorten the voir dire without loss of its value.	40
10. That in automobile accident cases a pre-trial settlement conference be scheduled in every case, unless a party objects, and that a full scale pretrial occur in those cases in which the court or either party so requests.	41
11. That, as respects automobile accident cases, in jurisdictions which now permit the use of juries of less than 12, such smaller size (not less than 6 persons) juries should be used. Where such juries are not now permitted, provision should be made for their use.	42
12. That, as respects automobile accident cases, when a 12 person jury is employed, a non-unanimous verdict (but in which at least 9 concur) should be permitted.	42

13. That in appropriate cases video tape be utilized to present the testimony of medical witnesses.	Page reference to text 42-43
14. That impartial medical panels be established in jurisdictions where they do not now exist and that such panels be used frequently.	43
15. That judges be given statutory power, and that it be freely exercised, to order appropriate cases transferred to the lower court in which, considering the amount involved, the case should have been commenced. When these transfers occur the jurisdictional limit of the lower court should be increased automatically to cover whatever verdict is rendered in the case.	44-45
16. Continued efforts to dispose of automobile accident claims by prompt settlement and continued efforts to make periodic payments to or for claimants pending settlement agreement or judgment. In aid of such efforts, and for other reasons, a change to the comparative negligence doctrine (which may have the effect of making total victory for either side less likely) is recommended. Removing doubts about the presence of liability insurance and as to the available limits of liability, by providing for mandatory liability insurance and by making the limits of liability discoverable also is recommended. In further aid of such efforts, devices such as Section 997 of the California Code of Civil Procedure should be tried more widely to the end that defendants are encouraged to make prompt and realistic settlement offers and plaintiffs are encouraged to accept them. Where needed, legislation to permit prompt disposition of some claims arising out of an accident without prejudice to the defense of other claims and to permit advance payments without fear that they will be construed as an admission of liability should be enacted.	48-51
17. That the right of trial by jury should not be abolished as respects negligence cases arising from automobile accidents, nor should its use be interfered with seriously by procedural obstacles or by the imposition of unreasonably high costs upon the litigants.	51-54
18. The continued use of voluntary arbitration	54-61

as a means of resolving disputes within the scope of the Nationwide Inter. Company Agreement or within the scope of the Special Arbitration Agreement and in the disposition of claims under uninsured motorist coverages.

Page reference
to text

19. The continuation of efforts to bring about a fair and workable plan for the voluntary arbitration of appropriate categories of small tort claims arising from automobile accidents, but the emphasis should be on efforts to improve the stature of the courts and their ability to do their work on time, on assuring litigants easy access to the courts for the resolution of their controversies by professional judges, and on seeing to it that the right of trial by jury is preserved, in fact and in theory.

60-61

20. That programs of judicial education be intensified and expanded and that judges, particularly new judges, should be enabled to participate in the programs at public expense.

61

21. That greater emphasis be placed on training lawyers for advocacy, both in the law schools and in continuing legal education.

61-62

22. That judges should adhere to work schedules developed by the administrative judge to the end that judicial work loads are consistent with generally acceptable standards, and that in jurisdictions where the pace of judicial performance is recognizably slow the local bar associations should, if necessary, initiate speed up programs.

63-64

23. That lawyers should not contribute to the problem of delay by being dilatory in their work, or by failing to be ready to proceed with the case when it is reached for trial.

64-65

24. That in places where excessive and unjustifiable delay in the courts now exists, the number of trial judges should be increased, and whenever the need is clear, appropriate increases in supporting personnel and physical facilities should be provided. The recommended method of assuring that the number of judges shall be adequate to meet the expanding need is a constitutional or statutory provision which creates a new judicial office and requires it to be filled upon each significant change in the ratio between the population and the number of judges.

65-66

B. RECOMMENDATIONS AS TO SUBSTANTIVE LAW

WE RECOMMEND, As Respects Automobile Accident Cases:	Page reference to text
1. That the states adopt a Wisconsin type of comparative negligence system supported by a special verdict procedure.	74-77
2. That the states which adopt the Wisconsin comparative negligence system make statutory provision for contribution among joint tort feorsors proportionate to the percentage of causal negligence attributable to each.	77-78
3. That the states in which the doctrine of contributory negligence is abolished should consider the abolition of the last clear chance rule.	79
4. That the doctrine of governmental immunity, as respects states and municipalities and their departments, commissions, boards, institutions, arms or agencies, be abrogated so as to make such defendants liable for injuries and damages negligently inflicted through their operation, maintenance or use of automobiles.	79-81
5. That the doctrine of the immunity of charitable organizations be abrogated.	81-84
6. That the doctrine of the immunity of a spouse to the tort claim of the other spouse be abolished.	84-85
7. That the doctrine of the immunity of a parent to the tort claim of his child and of the immunity of a child to the tort claim of his parent be abolished.	85-86

C. RECOMMENDATIONS AS TO THE LAW OF DAMAGES IN AUTOMOBILE ACCIDENT CASES

WE RECOMMEND:

1. That the general rules, including the collateral source rule, for the ascertainment of damages on an individualized basis be retained;	87-92
2. That additurs or remittiturs be used in those instances in which the damages awarded are excessive or inadequate;	96

3. That the jury be instructed of the fact that compensatory damages on account of torts or tort type rights are not subject to income tax;	Page reference to text 92-95
4. That statutory limitations upon damages in death cases, in those states in which the recovery is measured by pecuniary loss, be removed.	95-96

D. RECOMMENDATIONS AS TO CERTAIN CATEGORIES OF PERSONS
WHO ARE INJURED IN AUTOMOBILE ACCIDENTS.

WE RECOMMEND:

1. The Uncompensated Claimant.--We recommend that a plan, termed "The Crossover Medical Plan" (under which every victim of an automobile accident, except perhaps those flagrantly at fault, who incurs medical expense as a result of an automobile accident would be paid an amount equal to that expense up to a stated amount), be studied by interested persons and particularly by the insurance industry, and that the objective results of the studies, including reasonably precise cost data and any alternative proposal for dealing with the problem of the uncompensated injured person on a third-party basis, be made available to the bar, to legislatures and to the public.	97-100
2. The Overcompensated Claimant.--We recommend that a plan, termed "The Quick Settlement Option" (under which an insurance company is given an option, if it is promptly availed of, to settle described categories of automobile accident cases for values determined by a formula), be studied by interested persons, and particularly by the insurance industry, and that the objective results of the studies, including reasonably precise cost data, and any alternative proposal for dealing with the problem of the overcompensated injured person be made available to the bar, to legislatures and to the public.	100-103
3. The Seriously Injured, Undercompensated Claimant.--We recommend several things, which are aimed more specifically at other problems, each of which are believed to contribute something toward the easing of this problem, namely: compulsory insurance, mandatory uninsured motorist coverage, increased limits of liability, removal of certain statutory limitations, replacing the contributory negligence doctrine with a comparative negligence	103-105

doctrine, assurance of at least part payment of medical expense, retention of collateral source benefits, relief of time pressure to settle by reducing delay in the courts.

E. RECOMMENDATIONS AS TO COSTS

WE RECOMMEND:

Page reference
to text

- | | |
|--|---------|
| 1. Automobile Insurance Costs.--Further and persistent effort to find better and less costly ways of providing and distributing the automobile insurance product and of performing all other automobile insurance services with optimum speed and economy. | 105-110 |
| 2. Costs of legal services in automobile accident cases.-- | 110-119 |

The Contingent Fee

- a. The contingent fee system is a valuable method of making legal services available to a person who has a legitimate claim but insufficient means to pay or retain an attorney, and its use should continue.
- b. Courts, upon whom the duty of supervising the legal profession rests, should assume where necessary or advisable, exclusive responsibility (1) in the examination, scheduling and supervision of contingent fees, and (2) in the disciplining of attorneys who have violated the rules or have acted unprofessionally.
- c. Courts should consider the need and expediency of requiring lawyers to file information on contingent fees. Requirements should be promulgated in the light of local conditions. Among the requirements that should be considered are the filing of information on all contingent fee contracts and arrangements (oral or written) with the courts and the filing of closing statements in all cases.
- d. Courts should, where appropriate, promulgate a contingent fee schedule, considering such factors as whether the case is settled before, during or after the trial;

whether a case is appealed; the probable amount of time and effort expended by the lawyer; the complexity of the case; the ingenuity exercised; the risk involved; and what, in the over-all view, should constitute a fair and reasonable fee for services performed.

- e. Courts should provide (1) appropriate means and methods for clients to file complaints and (2) procedures for the consideration and determination of such complaints.
- f. If a lawyer pays or a forwarding lawyer is paid a referral fee, the amount should be fair and reasonable and have direct relationship to the value of the services performed. Any such payment should be subject to the review of and determination of the court.

F. RECOMMENDATIONS AS TO AUTOMOBILE INSURANCE

WE RECOMMEND:

1. That states that have not done so adopt compulsory automobile insurance laws (allowing alternative methods of assuring that the defendant will be financially able to respond in damages, such as the advance posting of a bond, cash or securities) applicable to both bodily injury and property damage liability and that the required limits of liability be not less than \$10,000 for bodily injury sustained by one person as the result of one occurrence, \$20,000 for all such damages sustained by two or more persons as a result of one occurrence, and \$5,000 for property damage resulting from one occurrence. 119-124
2. That such compulsory insurance laws require that every policy issued contain uninsured motorist coverage, which includes insolvency protection. 125-126
3. Continued efforts to persuade insurance buyers that higher limits of liability than those required by law are advisable for their own protection and for the protection of injured persons. 126-127

4. That states now requiring limits of liability less than 10/20/5 change their statutes to require at least those amounts. 126-127

G. RECOMMENDATIONS AS TO THE USE OF THE TORT LAW TO
DETER DANGEROUS DRIVING

WE RECOMMEND:

1. That efforts to utilize the tort law and the insurance rating system, as well as the criminal law, to strengthen deterrence of dangerous driving be continued, and that studies be encouraged to seek further enlightenment as to how such effects can be most effectively and acceptably strengthened. 127-131

H. RECOMMENDATIONS AS TO THE COTTER PLAN

WE RECOMMEND support for the following proposals included in the Cotter Plan: 148-155

1. That the doctrine of comparative negligence be adopted along with a special verdict procedure and that provision be made for contribution among joint tort feorsors. 148
2. That advance payments and prompt settlement of property damage claims be promoted by making clear that the payments do not constitute admissions of liability. 148
3. That stiff penalties be imposed for fraud and that the claimant should be required to cooperate in the furnishing of information and in submitting to physical examinations, our support for this proposal is conditioned upon reasonable safeguards for the claimant and his attorney being provided. 149
4. Support, in principle, for the concept that provision be made to recognize the tax free nature of damage awards. 148-149

WE RECOMMEND opposition to the following proposals included in the Cotter Plan:

1. Mandatory arbitration of tort claims in the form proposed and under the circumstances which exist in Connecticut. 150-151
2. The mandatory inclusion in private passenger automobile liability policies of "no fault bene- 151-154

fits" on an accident and health insurance (first party) basis.

3. That awards for pain, suffering and inconvenience be limited (with some exceptions): 154-155

(a) in cases in which the medical and hospital expense is not over \$500, to 50% of such expense

(b) in cases in which the medical and hospital expense is in excess of \$500, to 50% of the first \$500 plus 100% of the "medical" in excess of \$500

4. To limit contingent fees in the manner specified in the "Cotter Plan", viz. in any event no more than 25% of the amount of the recovery unless application for greater compensation is made to the court, & authorizing any court in the state to adopt rules prescribing graduated maximum contingent fee schedules but not exceeding the 25% limitation. 149

I. RECOMMENDATIONS AS TO HIGHWAY SAFETY

WE RECOMMEND:

1. That lawyers study and support all wisely conceived programs aimed at the prevention of highway accidents and injuries. 169-174

J. THAT THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS BE CONTINUED.

K. THAT PERSONS DESIGNATED BY THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION BE AUTHORIZED TO SUPPORT THE ADOPTION OF LEGISLATION CONSISTENT WITH THESE RESOLUTIONS AND TO OPPOSE APPROPRIATE LEGISLATION INCONSISTENT WITH THESE RESOLUTIONS BEFORE APPROPRIATE LEGISLATIVE BODIES AND OTHER GROUPS.

OUTLINE OF THE REPORT

RECOMMENDATIONS	i-xi
OUTLINE OF THE REPORT	xii-xvii
I. INTRODUCTION	1
Creation and Appointment of Special Committee and Commission	1
Members of the Special Committee	1-2
Members of the Commission	2-3
Preliminary Report to House of Delegates	3
Dimensions of the Problem	4
Committee Meetings	5
Meetings with the Commission	5
Materials Considered	5
Invitations to Appear	6-6A
Necessity for Selectivity	7
The Form of the Report	8
II. THE CHANGING LAW OF TORTS	9-17
Liability Based on Fault	9
Railroads	10
Master and Servant	10
Concern with the Individual	11
Negligence Law and Traffic Cases	12
Values of the Present System	16
III. THE CRITICISMS OF THE PRESENT SYSTEM	18
Introduction	18
Statement of Criticisms	19-21
IV. COMMENTS, CONCLUSIONS AND RECOMMENDATIONS AS TO EACH OF THE LISTED CRITICISMS AND OTHER MATTERS	23
1. <u>Delay in the Courts</u>	23
A. Introduction	23
The Merit Plan for Judicial Selection and Tenure	24

The American Bar Association's Recommendations on Court Procedure	25
The Pamphlet -- "Ten Cures for Court Congestion"	25
Other Publications	26
Section and Committee Reports	26
Removal, Discipline and Retirement of Judges	28
Delay as a Source of Danger to our Existing System	30
B. The Extent of Delay in the Courts	32
How Much Delay Is There?	32
Delay Is Not Inescapable.	32
Delay Is a Threat to the Present System.	34
C. Major Basic Steps to be Taken in Seeking to Relieve Delay in the Courts	34
1. Court reorganization, court administration, selection and tenure of judges	34
(a) A unified court system	34
(b) Court administration	35
(c) Merit selection of judges	37
(d) Tenure, discipline, and removal of judges	37
2. Shortening the trial of the case	39
(a) Jury waivers	39
(b) The pre-trial conference	41
(c) Trial by a jury of less than 12	42
(d) Less than unanimous verdicts	42
(e) Medical testimony on video tape	42
(f) The impartial medical panel and the model expert testimony act	43
3. Remanding cases to courts with lower jurisdictional amounts	44
4. Increasing the proportion of settlements of claims and suits	46
(a) Examination of criticism that prompt settlements are unusual	46
(b) Use of "advance payment" plans	48
(c) Interest	49
(d) Court costs	50
(e) The California offer of judgment	50

(f)	Making total victory less likely (comparative negligence)	50
(g)	Removal of uncertainty -- com- pulsory insurance, limits dis- coverable	51
(h)	Settlements without prejudice	51
D.	Should Jury Trials be Abolished in Automobile Negligence Cases?	51
1.	Committee opposes abolition of right of trial by jury	52
2.	How much time could be saved?	52
3.	The special contributions of the jury to the viability of the automobile accident reparations system	53
4.	Selection of jury panels	54
E.	Is Arbitration a Solution?	54
1.	The nationwide inter-company arbitra- tion agreement	55
2.	The special arbitration agreement	55
3.	Uninsured motorist coverage	55
4.	The accident claims tribunal	57
5.	The "Philadelphia story" or "trial by lawyer"	57
6.	General conclusions	59
F.	Training and Performance of Judges and Lawyers	61
1.	Training of judges	61
2.	Training for advocacy	61
3.	Performance of judges	63
4.	Performance of lawyers	64
G.	More Judges -- The Ultimate Remedy	65
H.	The Goal -- Justice Without Avoidable Delay	66
2.	<u>The Reliability of Fault Determinations -- Complexity, Dishonesty, etc.</u>	68
	The Evidence -- Opinion and Empirical Conclusion as to Feasibility of	69
	Utilization of Fault	73
	Dishonesty	73

3.	<u>The Doctrine of Contributory Negligence and Related Matters</u>	74
	Effects of a Change to Wisconsin Type of System of Comparative Negligence	75
	Statutes of Various States Considered	76
	"Before and After" Survey in Arkansas	76
	Contribution Among Joint Tortfeasors	77
	The Last Clear Chance Rule	79
4.	<u>Immunities</u>	79
	A. Governmental Immunity	80
	B. Immunity of Charitable Organizations	81
	C. Intra-Family Immunities	84
	1. Spouses	84
	2. Children	85
5.	<u>Automobile Guest Statutes</u>	86
6.	<u>Rules for the Ascertainment of Damages In Automobile Accident Cases</u>	87
	Underlying Principle	87
	What We Expect the Jury to Do	88
	Would Another Approach Yield Better Results?	89
	Consideration of Specific Complaints	89
	The Collateral Source Rule	90
	Special Status of Workmen's Compens- ation Benefits	92
	Income Taxes on Damage Awards	92
	Amount of Recovery for Wrongful Death	95
	Conclusion	96
	Recommendation	96
7.	<u>The Inequity of Awards Under the Present System</u>	97
	A. The Uncompensated Claimant (includes a discussion of the cross over medical proposal)	97
	B. The Overcompensated Claimant (includes a discussion of the Quick Settlement Option Proposal)	100
	C. The Seriously Injured Undercompensated Claimant	102
8.	<u>Costs</u>	105
	A. Insurance Costs	105

Costs by rating territories	106
Proportion of the premium dollar paid to or for injured persons	107
Costs should be related to services performed	109
Recommendation	110
Chart -- Net income of leading corpor- ations grouped by industry	109A
B. Costs of Legal Services	110
(1) The contingent fee	110
(2) Fees for the defense of cases	110
9. <u>"Gap Problems"</u>	119
A. The Insurance Gap	120
(1) To create an unsatisfied judgment fund using enforced contributions from uninsured car owners and from insured car owners, directly and in- directly via assessments on insurance companies	121
(2) To require each purchaser of insurance to buy uninsured motorist coverage	122
(3) To require universal compulsory liability insurance	123
B. The Insolvency Gap	125
C. The Limits of Liability Gap	126
10. <u>Deterrence</u>	127
11. <u>Absence of Criticism of Certain Important Functions of the Present System</u>	132
V. <u>CONSIDERATION OF CERTAIN PROPOSALS FOR CHANGE</u>	133
1. <u>The Keeton-O'Connell Basic Protection Proposal</u>	133
2. <u>The Proposal of the American Insurance Association</u>	140
3. <u>The Cotter Plan</u>	148
4. <u>Other Proposals</u>	156
A. The Guaranteed Benefits Program of the American Mutual Insurance Alliance	156
B. The Columbia Plan	157
C. The Conard Plan	158
D. The Saskatchewan Plan	160

E.	California Plan	160
F.	Inverse Liability	161
G.	National Compensation Plan for Automobile Accident Cases	162
H.	The Moynihan Plan	163
I.	Ehrenzweig's Full Aid Insurance	163
J.	Green's Comprehensive Loss Insurance	164
K.	Should We Insure the Driver Instead of the Car?	164
L.	Deductible Provisions in Automobile Liability Policies	167
VI.	HIGHWAY SAFETY	169
VII.	CONCLUSION, BRIEF RECAPITULATION OF AFFIRMATIVE PROPOSALS AND A CONSIDERATION OF INTER-RELATION- SHIPS AND COSTS	175
	APPENDIX A. Chart showing features of various plans	182
	APPENDIX B. Explanation of Rhode Island Senate Bill S512	186

NOTE: Footnote numbers are assigned to the listed sections as follows:

- I. Numbers 1 to 3
- II. Numbers 1 to 11
- III. Numbers 1 to 3
- IV. Numbers 1 to 166
- V. Numbers 1 to 34
- VI. Numbers 1 to 8
- VII. Numbers 1 to 4

I. INTRODUCTION

The Special Committee on Automobile Accident Reparations was created by the House of Delegates of the American Bar Association on February 20, 1968. The resolution of the House proposed "a comprehensive study and investigation of the problems inherent in the prompt and fair disposition of automobile accident claims". It also created a Commission on Automobile Accident Reparations to assist and advise the Special Committee. The Committee was to be composed of a chairman and not more than eight other members. The Commission was to be composed of not more than twenty members and to consist of the members of the Special Committee, ex officio, and others to be appointed by the President. The Committee, not the Commission, has the responsibility for the study and the report. The report and the recommendations are the work product of the Committee.¹

Pursuant to this resolution, the President of the Association, after consulting with representatives of the Section of Insurance, Negligence and Compensation Law, the Section of Judicial Administration and the Section of General Practice, appointed the Special Committee, comprised of:

George B. Powers, Chairman
Wichita, Kansas

Nelson C. Barry
San Francisco, California

Hon. Horace W. Gilmore
Detroit, Michigan

Raymond H. Kierr
New Orleans, Louisiana

Edward W. Kuhn
Memphis, Tennessee

John M. Moelmann
Chicago, Illinois

Hon. John T. Reardon
Quincy, Illinois

¹ Robert E. Keeton, a member of the Commission, has requested the Committee to make explicitly clear that he does not acquiesce in what is said in the report about the Keeton-O'Connell basic protection plan. Harold Scott Baile, also a member of the Commission, has requested the Committee to make explicitly clear that he does not acquiesce in what is said in the report about the American Insurance Association's "Complete Automobile Protection Plan."

J. Ronald Regnier
Hartford, Connecticut

Orville Richardson
St. Louis, Missouri

The President appointed to the Commission

Harold Scott Baile
American Insurance Association
Philadelphia, Pennsylvania

Professor Harold Demsetz
Graduate School of Business
University of Chicago
Chicago, Illinois

*Leslie V. Dix
Director for Legislative Affairs
President's Committee on Consumer Interests
Washington, D. C.

Ernest C. Friesen, Jr.
Director of Administrative Office of U. S. Courts
Washington, D. C.

Jacob D. Fuchsberg, Attorney
New York, New York

Professor Harry Kalven
University of Chicago Law School
Chicago, Illinois

Professor Robert E. Keeton
Law School, Harvard University
Cambridge, Massachusetts

Andre Maisonpierre
American Mutual Insurance Alliance
Chicago, Illinois

David O. Maxwell
Commissioner, Insurance Department
Commonwealth of Pennsylvania
Harrisburg, Pennsylvania

*Mr. Dix became Assistant to the Director, Bureau of Deceptive Practices, Federal Trade Commission. He resigned as a member of the Commission, February 28, 1969.

Arthur C. Mertz
American Association of Independent Insurers
Chicago, Illinois

Michael Pertschuk
General Counsel, Senate Committee on Commerce
Washington, D. C.

Preceding the action by the House of Delegates there had been interest and activity concerning the subject in the Section of Insurance, Negligence and Compensation Law and in the Section of Judicial Administration.

The Committee began its task with due regard to the expressions in the whereas clauses of the resolution that in considering the problem it should avoid hasty judgments which could endanger the long-range interests of the public and the American system of jurisprudence and that it should consider the principle of liability based on fault, the adequacy and efficiency of the American court system and the services and functions of the legal profession. It made a report to the House of Delegates, during the Annual Meeting in Philadelphia, Pennsylvania, in August, 1968, that its work was proceeding and recommended that the Committee and the Commission be continued. This resolution was adopted and the work proceeded.

At the January 27, 1969, meeting of the House of Delegates, the Committee presented a report and four recommendations. The first of these was that the Committee be continued for certain stated purposes. The second was that the present system for providing reparations to those injured in automobile accidents be retained as the basic legal structure for dealing with such cases, but that specified changes in the system should be made or considered and that two ideas for modifications should be studied further. The third resolution was to the effect that proposals such as the Keeton-O'Connell basic protection plan and the "Complete Automobile Protection Plan" of the American Insurance Association should be opposed. The fourth resolution was that persons designated by the President of the American Bar Association be authorized to support the adoption of legislation consistent with these resolutions and to oppose legislation inconsistent with them before appropriate legislative bodies and other groups.

The action taken by the House was to approve the Committee resolution with an amendment. The effect of the amendment was to approve Recommendations I, III and IV. As respects the proposals for specific changes, which were set forth in the second of the Committee recommendations, the amendment directed that they should be considered further and a final report submitted in time for distribution to the House 30 days before the annual meeting in Dallas.

Pursuant to this action the committee has continued its work, directing its particular attention to the changes the Committee be-

lieves should be made and to the items that should be considered further.

The Dimensions of the Problem

Throughout our study we have been conscious of the dimensions and the complexity of the problem of reparations for persons sustaining injury or damage from automobile accidents, yet that a report at a reasonably early date was desirable. Thus, it has seemed advisable to limit somewhat the scope of our work and to be selective in choosing the topics with which to deal.

We are keenly aware that in considering what recommendations to make we should not lose sight of the importance of the automobile in the economic and social life of our nation. The automobile is an ever-increasing and ever more important part of our lives. It enlarges our area of choice in locating our homes, it enables millions of people to live in non congested communities. It makes available vacation and recreational areas that otherwise could be reached only by a few. For many people it is virtually the only regularly used means of transportation. It enhances our efficiency. The automobile industry is interwoven with many other industries. The use of the automobile has affected land use, city planning and the location of schools and colleges. It has become indispensable. Its use should not be burdened or restricted unreasonably. Yet every year, and even though the fatality rate per one million miles of driving has been declining, automobile accidents kill more than 50,000 people and it is said that the number of those injured in automobile accidents is approaching 4 million per year.²

No responsible and responsive government could fail to recognize the responsibilities that arise from these facts. Responsibilities to the injured and the dependents of the dead, to the people who seek assurances of their ability to pay for the consequences of their negligence by the purchase of insurance and to the insurance companies that assume these huge financial burdens. Responsibilities to build safe roads, to assure safe cars, sober and competent drivers, to regulate traffic, to provide appropriate and adequate means for the prompt resolution of legal controversies, to do all that wise governments should do to choose the goals to be pursued, to accept the mandate to act sternly and vigorously in the pursuit of these goals and yet to recognize and heed our continuing desire to lead unregimented lives.

² One should not lose sight of the size and importance of the activities that produce these results. The United States has almost half of all the improved highways of the world, and about two thirds of the world's automobiles operate on those highways. The price paid, in terms of fatalities per 100,000 registered vehicles, is 52 compared with 250 in Europe. See Borkenstein, *The Cost-Benefit Aspects of Driver Licensing*, 35 INS. COUNSEL J. 559 (1968).

We are conscious of the numerous proposals for change and of the numerous investigations pending or in progress.³ We are also of the view that mere assertions of what opinion the public has are not always to be taken at face value. We know, too, that evolution can occur while revolution is being rejected. That it is appropriate for the American Bar Association to accept a special responsibility for dealing with the subject of reparations for the victims of automobile accidents is too plain to justify extensive statement.

Committee Meetings

Prior to the 1969 Midyear Meeting, the Committee held 11 meetings, usually working two full days and one evening at each meeting. Four additional meetings have been held. At most of these meetings the entire membership of the Committee was present. Much material was made available to the Committee and was considered by the members at the meetings and during the intervals between meetings. At all meetings members of the American Bar Association staff were in attendance. The reporter, Franklin J. Marryott, attended all meetings after his appointment, which occurred shortly after the Philadelphia meeting of August 3 and 4, 1968.

The Committee has also had the benefit of the views expressed by members of the Commission. These have been four meetings at which Commission members attended. All commissioners have met with the committee, some of them as many as four times.

Materials Considered

All of the members of the Committee have had a long continued interest in the subject. It was a balanced Committee in the sense of being comprised of judges, plaintiffs' lawyers, defense lawyers and general practitioners. All Committee members, from their general reading and through active membership in various Bar groups, were well acquainted with the actual workings of the tort law in its relationship to automobile cases, with the usual automobile insurance coverages, with the criticisms that have been made of the adversary system and of the tort law, and with the more widely publicized proposals for changes. This background information has been expanded by study of a large number of law review and other articles, by speeches, by statistical information obtained from various sources, and, of course, by discussions among ourselves, in and out of meetings. The American Bar Foundation has been most helpful in collecting and providing informa-

³ Apart from several state-level studies, there are seven federal investigations being conducted or to be conducted--by the Department of Transportation, the Federal Trade Commission, the House Judiciary Committee, the Senate Judiciary Committee's Subcommittee on Judicial Machinery, the House Committee on Interstate and Foreign Commerce, the Senate Commerce Committee, and the Senate Subcommittee on Antitrust and Monopoly.

tion.

Invitations to Appear

The Committee extended written invitations to approximately 600 persons and organizations, believed to have some special interest in automobile accident reparations, to appear at the Committee's August 4, 1968, meeting in Philadelphia and to make suggestions or recommendations or to furnish statistics, information and studies on that occasion or by mail.

These invitations were sent to insurance commissioners, state and local bar associations, consumers' organizations, members of judicial councils and conferences, members of Congress, insurance organizations and many others who had expressed interest, or were known to be interested, in the subject. In response to these invitations, the Committee was favored with a number of oral presentations and with several written statements. The statements that were received in time for inclusion in the Report that was presented on January 27, 1969 to the House of Delegates of the American Bar Association, are summarized in that Report. These statements, which are on file in the office of the Secretary of the American Bar Association, were from the following persons or organizations:

1. The Syracuse Defense Group (Vito Romano, Esq. Chairman)
2. The Illinois Defense Counsel
3. The New Jersey Defense Association (Bernard F. Boglioli, Secretary)
4. The Young Lawyers Section of the American Bar Association
5. The International Academy of Trial Lawyers (represented by Horace G. Brown, Esq.)
6. The American Federation of Labor and Congress of Industrial Organizations (Kenneth A. Meiklejohn Legislative Representative)
7. Professor James D. Ghiardi, Research Director, Defense Research Institute
8. The New York State Association of Trial Lawyers (501 Broadway, New York City)
9. The Federation of Insurance Counsel (Wilbur W. Jones, Esq. of Columbus, Ohio, President)
10. Consumers Union (Publisher of Consumer Reports) Walker Sandlach, Executive Director, Mt. Vernon, New York

11. Cleveland Defense Attorneys Group (Mark O'Neill, Secretary)
12. Consumer Federation of America (Mrs. Erma Agevine, Executive Director, Washington, D. C.)
13. Texas Assn. of Defense Counsel (Howard Barker, Esq., Immediate Past President)
14. Insurance Company of North America dated Oct. 14, 1968 (Edmond Rondepierre, Assistant Counsel)
15. Board of Governors of The Missouri Bar (Wade F. Baker, Executive Director)
16. Chairman of Civil Procedure Section of the State of New Jersey Bar Assn. (Edward W. Wise, Jr.)
17. William G. Walton, Insurance Commissioner of the State of Wyoming
18. A. John Blake, Esq., of Elizabeth, New Jersey
19. The Defense Research Institute, the International Assn. of Insurance Counsel, the Federation of Insurance Counsel and the Association of Insurance Attorneys

The Committee has a record of appearances as follows:

Professor David J. Sargent
Suffolk University Law School
Boston, Massachusetts

Mr. T. Lawrence Jones
President, American Insurance Association
New York, N. Y.

Robert G. Beloud, Esq.
Upland, California

Paul Blume, Esq.
National Assn. of Independent Insurers
Chicago, Ill.

Edward C. German, Esq.
President 1966-67
Federation of Insurance Counsel
Philadelphia, Pa.

John A. Kluwin, Esq.
Former President
International Assn. of Insurance Counsel
Milwaukee, Wisc.

Mr. Lloyd G. Jackson
1st Deputy Insurance Commissioner
Des Moines, Iowa

Louis G. Davidson, Esq.
Vice Chairman of the Section of Insurance,
Negligence and Compensation Law
Chicago, Ill.

J. Harry Labrum, Esq.
Vice Chairman of the ABA Traffic Court
Program Committee
Philadelphia, Pa.

Leonard Amdursky, Esq.
Chairman of a Committee on this general subject
of the New York Bar Association
Oswego, New York

William Fitzpatrick, Esq.
Vice Chairman of the New York Committee
Syracuse, New York

Craig Spangenberg, Esq.
representing the American Trial Lawyers Assn.
Cleveland, Ohio

Necessity for Selectivity

No such group could, within any reasonable time limitations, hope to study anew all of the materials that have been written or spoken on each of the several subjects that, in combination, constitute what has come to be referred to as the problem of reparations for those injured in automobile accidents. Some degree of selectivity was necessary if the report of this Committee was to be of some timely and practical value to the general public, to the legislatures and to the Bar in their consideration of various proposals for important and, in some instances, drastic proposals for change.

This Committee should have unique qualifications to make realistic and practical evaluations of proposals offered by others for changes and improvement and to come forward with suggestions of its own. These suggestions should contribute to the utility of the system without destroying the values which have made it such a flexible and enduring mechanism for the ascertainment of truth, for determining what conduct is so unacceptable as to be called "negligence" and for making the difficult and discriminating determinations as to what amounts of money will reasonably compensate the claimants for their injuries and damages.

The Form of The Report

Following this introduction is a brief essay on "The Changing Law of Torts", then a list of the principal criticisms that have been directed at the present system. Next, are our recommendations for changes in the present system together with the facts and reasoning which led to our conclusions. In respect to some of the criticisms we regard them as valid, and as to these we have set forth our proposals and recommendations for remedial action.

The fifth section consists of a description of and a statement of our views as to several of the proposals for changes in the existing system that had come from sources other than this Committee. The sixth section consists of comments on highway safety. The seventh and final section recapitulates our conclusions, suggestions and affirmative recommendations and discusses their inter-relationships and probable effects upon insurance costs.

The outline of the report is set forth at page xiii to xvii. In broad form it is as follows:

- I. Introduction
 - II. The changing law of torts
 - III. A statement of the criticisms of the present system
 - IV. Comments, conclusions, and recommendations as to each of the listed criticisms and other matters
 - V. Consideration of certain proposals for change
 - VI. Highway safety
 - VII. Conclusion--Brief recapitulation of affirmative proposals and a consideration of inter-relationships and costs
-
- Appendix A Chart showing features of various plans
 - Appendix B Explanation of Rhode Island, S 512 (1969) proposing a modified form of the basic protection plan

II. THE CHANGING LAW OF TORTS

The history of the law of torts consists of the record of how the law has changed to reflect society's satisfaction or dissatisfaction with its institutions.

In medieval times the law supplied the need for protection against harm by applying a strict code of conduct: use your own property in ways that do not cause injury to another; if you can't show that you were without fault you are liable; you are presumed to intend the consequences of your acts.

Economic and social institutions changed slowly in those times. So did the law. Not until the beginning of the 19th century was there a rapid change. Professor Green attributes this to the great increase in highway travel that was then occurring and to an overriding policy of not unduly burdening the newly found ability to become mobile.¹ Ability to move the goods from the newly built mills and factories, and to enjoy the pleasures of travel, suddenly became important. The old doctrines did not serve the new needs.

In due course the law ceased to require the defendant to prove himself utterly without fault and began to talk in terms of the defendant's duty only to exercise reasonable care in the operation of his vehicle. The standard of care began to be stated in terms of how a reasonably prudent man would have acted. The consequences for which the defendant could be liable were limited to the natural and probable consequences--the proximate, not the remote. The defendant ceased to be liable for the acts of his servant, unless the servant was acting within the scope of his employment. The victim found himself bearing the burden of proof.²

Liability Based on Fault

Was this a matter of a newly emerging morality that had as its core the principle of "no liability without fault"? Not at all, says Professor Green, it was a response to economic and social needs. Nevertheless, the courts did base their decisions on what they came to regard as an "eternal" moral principle--whether imported from Rome or found deep within their own religious and philosophic souls. The principle was that liability was based on fault. The net result was to

¹ L. GREEN, *TRAFFIC VICTIMS, TORT LAW AND INSURANCE* (1958). Dean Green says his book seeks "to demonstrate the obsolescence and futility of common law jury trial and liability insurance as a remedy for traffic casualties." See the review of this book by former Judge W. St. John Garwood, 37 *TEXAS L. REV.* 516 (1959).

² *Adams v. Carlisle*, 38 Mass. 146 (1838), sustained a charge placing the burden on the plaintiff to "satisfy the jury beyond a reasonable doubt" as to the defendant's negligence and his own care.

give greater protection than before to the riders of horses and the drivers of vehicles, while still maintaining the old common law strict liability to the owners of goods being carried. The accident victim had to bear at least some of the risk if the freedom of the highways was to be fostered and protected.

Railroads

The same forces, aided this time by legislation, shaped the early law applying to railroads. Of course, there were many adjustments and adaptations reflecting the early need to protect this new means of carriage and transportation. Some cases went to the point of applying the contributory negligence rule to those injured by railroad operations,³ and in England (but not in the United States) railroads were relieved from their strict common law liability for fires. As late as 1928 there was sort of a flashback proclamation (by Mr. Justice Holmes) in *Baltimore & Ohio Railroad Company v. Goodman*, 275 U. S. 66, of the "get out and reconnoiter" doctrine. The strict common law rule of liability for goods being carried for pay was retained in the railway cases as it was in the highway cases.

As the railroads quickly became powerful and rich, it did not take long for the pendulum to swing toward giving greater protection to those injured by railroad operations. Fence your right of way. Maintain lookouts for trespassing animals. Watch out for people walking on your tracks. Use headlights. Keep your brakes in good repair. Provide signals at crossings. All these commands reflect how, as respects railways, the attitude of the law changed in the direction of greater protection for the individual who sustained an injury.

Master and Servant

The modern law of master and servant is a slightly crumbling monument to the failure of the law of negligence to adapt itself to the needs of the 20th century. It is a development which stands apart and accomplishes results incongruous with the law of torts. It need not, indeed cannot, be reconciled with its principles.

The invention of machines and their use in factories employing many people soon brought about circumstances in which the master could not effectively personally control the manner of work and the condition of the tools. Imposition of strict liability for injuries to employees would have resulted in heavy burdens on the newly developing enterprises. The master's defenses developed even before his duties were defined. Scope of employment, contributory negligence, assumption of risk, the fellow servant doctrine, became such well established de-

³ *Pittsburg & Connellsville Railroad v. McClung*, 56 Pa. St. 294 (1867), and *Pennsylvania Railroad Company v. Asfill*, 23 Pa. St. 147 (1854).

fenses that their effect was not destroyed by the later imposition of duties upon the employer (safe place, safe tools, competent fellows, instructions and warnings, rules for conducting the work). The employee had a hard road to follow if he sought damages for his injuries. But if the defenses were removed, he would be better off than the outsider and the burden on the enterprise too heavy.

The reaction finally took the form of workmen's compensation statutes, which some regard as a great compromise. The prospect of compensatory damages was given up in return for liability being made absolute. The New York Court of Appeals held the first act unconstitutional because, among other reasons, it violated "the fundamental principle of liability based on fault".⁴ It took a constitutional amendment, but the march was on that was not to end until every state had its workmen's compensation law.

Workmen's compensation is not merely a matter of allowing the victim to recover without regard to his fault and thus lifting at least a part of his burden. It's a matter of passing the economic burden of compensation on to industry and then on to society as a whole.

Whether the end of the law of negligence in the master and servant field (but not for railway employees) predicts its end in other fields is a question that has been presented, but not yet answered.

Concern with the Individual

In the 20th century the law has moved away from its 19th century preoccupation, with protecting trade and industry from the strict liability imposed by the law of the middle ages, toward its 20th century concern with the individual and with his problem of recovering damages for his injuries.

We cannot choose more wisely than did Professor Green in selecting *MacPherson v. Buick*, 217 N. Y. 382, 111 N. E. 1050 (1916), and its forerunner, *Heaven v. Pender*, 11 Q. B. D. 503 (1883), for comment. He regards Justice Brett's generalizations, which we quote, in *Heaven v. Pender* as the stem of "the most clarifying and far-reaching development of modern tort law":

"And everyone ought, by the universally recognized rules of right and wrong, to think so much with regard to the safety of others who may be jeopardized by his conduct; and if . . . he does not think, and in consequence neglects, or if he neglects to use ordinary care and skill, and injury ensue, the law . . . will force him to give an indemnity for the injury. . . The proposition. . . is that whenever one person is

⁴ *Ives v. South Buffalo Railroad Company*, 201 N. Y. 271, 94 N. E. 431 (1911).

by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

This amounts to a generalization of the English tort law; it treats affirmative conduct as the basis of liability, it says that danger is the basis of the duty to exercise reasonable care and, as a corollary, it makes foreseeability of harm the standard by which to determine whether the actor has exercised reasonable care.

Lord Esher (then Justice Brett) did not have the satisfaction of having his colleagues place the liability on dockowner Pender on precisely the base stated. Indeed it was 30 years before Justice Cardozo brought the formula to the fore. He said:

"Perhaps it needs some qualification. . .but its tests and standards, at least in their underlying principles with whatever qualifications may be called for as they are applied to varying conditions, are the tests and standards of our law."

This formula, following its application by Cardozo to impose liability upon the manufacturer of an automobile that had a defective wheel, has opened great new areas to successful litigation. It subjected not only the manufacturers of motor vehicles to liability for defective automobiles but swept on to embrace all manner of machines, equipment, food and chemical products that are dangerous if defectively made and improperly marketed. Green says that Brett's formula as applied by Cardozo "gave negligence law its widest extension of the century".

Negligence Law and Traffic Cases

Did the defendant fail to exercise reasonable care in view of the the foreseeability of harm to the victim under all the circumstances? Was the conduct of the defendant the proximate cause of the claimant's injury? Was the claimant guilty of contributory negligence?

These questions do not seem too complex to expect a modern jury to answer. Why all the anxiety of the scholars about whether the negligence law can successfully adapt itself to dealing with the risks of the automobile age? Perhaps as we examine the matter closely we shall find that the scholars are not in full agreement among themselves.

In 1932 Arthur A. Ballantine seems to have been more impressed with the futility of a system in which but few judgments were collectible because liability insurance was carried by so few defendants than he was about the philosophy of the tort law, even though his ear-

lier allegiance was to the concept of bringing railway workers under a workmen's compensation law.⁵

Professor Fleming James, Jr., has been stating his belief in the need for a social insurance approach to automobile-caused injuries and his doubts about the ability of the tort law to serve these purposes for more than 20 years.

Professor Leon Green long ago convinced himself, (he reports no research on the subject) that it was not possible to learn how an automobile accident happened, and that even if it were, a rational allocation of responsibility could not be made on the basis of fault. Moreover, he believed that the questions that had to be presented to the jury were just too complex for it to deal with. Professors Keeton and O'Connell seem to have accepted much of Professor Green's thesis--but only for the less complex cases!

Let us now look more closely at these generalizations.

Thirty-five years ago Mr. Ballentine, then Chairman of the Committee that wrote the Columbia Report proposing a workmen's compensation system for automobile cases, said that it was the futility of the common law rather than its philosophy that troubled him. Looking back, one wonders why, instead of proposing the simple cure to this futility that had already been found in the Massachusetts Compulsory Insurance Law, his committee went to the extreme futility of proposing to destroy the whole negligence law in its application to motor vehicle cases.

Twenty years ago Fleming James, Jr., recognized with great clarity that the then prevalence of liability insurance (much less prevalent in 1948 than now) and the settlement practices of the insurance companies had changed the way in which the tort law actually worked and had brought about many of the benefits of the social insurance he advocated.⁶ He also observed the contributions that insurance made to accident prevention and the manner in which insurance companies furnished incentives towards safety by the way they adjusted their rates. He stated once again that the presence of insurance greatly increased the chance of collecting the judgment when liability existed and that it had started to open up possibilities of compensation when liability was questionable and even when there was no liability. Nevertheless, he clung to the idea that even if the then present system should improve it was "not likely to be permanent, but rather to yield to a system of

⁵ Ballantine, A Compensation Plan for Railway Accident Claims, 29 IARV. L. REV. 705 (1916).

⁶ Accident Liability Reconsidered: The Impact of Liability Insurance, 57 YALE L. J. 549 (1948).

full social insurance".

Professor James thought that some ancient doctrines--intrafamily immunities, for one--should yield to the fact of insurance only if not justified by reasons that are relevant today: not the danger of family disharmony but the danger of concerted assault by the family against the insurance company. He felt that measures like compulsory insurance and the development of new insurance coverages, such as medical payments, held the potential for prolonging the life of the tort system. But he fell into the use of the oft repeated cliché about "horse and buggy rules in an age of machinery" without ever seeming to realize that the automobile is more within the personal, direct control of its driver than the horse and buggy could ever be, or that the automobile age does not involve a man versus machine situation but rather one man with a machine versus another man with a like machine.

Professor Green thought that motor vehicle cases stretched the outermost limits of negligence law beyond the breaking point. To him that was why negligence law had "failed so miserably" to adapt to the risks of motor traffic:

"the conduct of the parties can be determined with relative accuracy; where the duties are clear and readily understood by persons generally; where the factors that produce the dangers are few, open and obvious--; where the conduct of the parties can be measured on the basis of personal experience by the general run of people, or measurements can be readily supplied by persons expert in the field of operations; in brief, where the details of a case can be made relatively explicit, here the issues of law and fact can be made to stand out with relative clarity and the excursions and defenses of negligence law submit to tolerable administration by judge and jury."⁷

To today's generation of tort lawyers, and, we suspect also to today's generation of citizens who have grown up with the automobile, these words seem to apply to the typical motor vehicle case being handled day after day, and with a high degree of assurance and competency, by insurance adjusters, lawyers, courts and juries.

Let us examine Professor Green's description of what the driver of an automobile must do:

"The operator must observe the operation of other vehicles, front and rear and to the sides--those he is meeting, those that pass, and those that may cross his path. He must observe road signs, stop signs, cautions, traffic lines, light signals and those of traffic officers. He must observe his speed and that of others. He must watch for signals of oth-

⁷ GREEN, Supra note 1, at 64.

er motorists and give proper signals himself. He must know the operating mechanisms of his machine; check their operations as he travels, and maintain his rapidly moving and complex machine under control at all times. These and other duties may be required of him every moment of his travel, made specific for the particular situation, all over-topped by the common law duty to use reasonable care under all the circumstances.

"Multiply the same duties and hazards by any number of other operators in the immediate vicinity; add the duties and hazards of highway maintenance, passengers, pedestrians, and adjacent landowners, the conduct of any one or more of whom may impose upon all operators in close proximity duties and hazards requiring instant and perhaps unerring judgment and action. Add further the hazards of climatic conditions; the imperfections of the human being in sight, judgment, muscular reaction, health, strength, and experience. Bring any combination of these duties and hazards into focus on a collision at high speed at a particular point of time and place. Who can name all the factors involved in causing the collision? Who can know or discover or describe the conduct of the parties involved? Who in retrospect from the tangled fragments of evidence given by the participants or bystanders and those who arrived on the scene at a later time; from marks and measurements, calculations of time and speed, is expert enough to reconstruct the fleeting scene with any assurance of its accuracy. If the picture by some miracle could be truly presented, who could pass a rational judgment in the allocation of responsibility as between the parties on any basis of fault?"⁸

The importance of this long quotation lies mostly in the fact that it was quoted and relied upon by Keeton and O'Connell as a cornerstone for their edifice.⁹

But the significant thing is that it is a fanciful description. It is literary rather than scientific. Driving is not that complicated. These duties do not confront a driver all at once but only a few at a time. The new generation, conditioned by growing up on wheels, is a generation of experts. Driving for half a million miles without being involved in an accident causing bodily injury is no longer unlikely but commonplace.

Professors Blum and Kalven question the premise that traffic accidents cannot be understood and evaluated: "Auto accidents are at

⁸ L. GREEN, supra note 1, at 66-68.

⁹ KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 16-17 (1965).

least more public than many other legal situations and they almost measurably do leave physical traces. The witness to an automobile accident is asked for observations likely to be well within his daily experience."¹⁰

Professor Green's premise is also challenged by the research referred to in Section IV. 2. of our report. (page 68-74)

It is too insecure a base upon which to construct a new system for handling automobile cases.

Our century has been and still is a period in which the law of torts reflects concepts of fairness and equity. That these concepts are of relatively recent origin is no argument for returning to more ancient codes of conduct.

If one had to sum up the present status of the negligence law in historical perspective in a sentence or two, he could probably do no better than to quote from Professor James, from his 1967 rather than his 1948 writings: "The likelihood that comprehensive legislative developments of the type described above (Saskatchewan, Keeton-O'Connell, etc.) will occur is highly speculative. . . Negligence is far from dead or even moribund in accident law".¹¹

The history of the law is change. Public policy, as someone once remarked, is not what people ought to want, it is what they do want. If people really do want to be compensated for auto-caused injuries without regard to fault, or to go some part of the way toward that status (and are willing to accept the consequences), we feel sure that such a system will come about.

Values of The Present System

But because such a change has an appeal to some does not mean that it is destined to occur. Almost before the ink had dried on the workmen's compensation laws, there were those who proclaimed the inevitability of the liability without fault concept being made applicable to automobile accidents. More than half a century has passed without this having come about. The idea that there should be no liability without fault, though eroded (or never fully applicable) where the rules seemed too hard on injured claimants, has exhibited a remarkable adaptability, vitality and durability in the face of almost constant criticism, the tempo of which has increased within the last few years.

We attribute this durability to a combination of things: a feeling that we should not turn back to the law of past centuries, a deep-

¹⁰ Public Law Perspectives on a Private Law Problem, 31 U. CHI. L. REV. 648 (1964).

¹¹ Negligence in Accident Law, 53 VA. L. REV. 911, 916, 917 (1967).

rooted instinct that one should not profit by his own wrong; that there are important values to be preserved in the form of individualized compensatory damages, deterrence, admonition, and a formalized outlet for emotions of revenge and self justification; that the negligence law offers a way of bringing safety efforts into meaningful focus; an appreciation that shifting of loss by the purchase of insurance is not the same as avoidance of blame; that persons should be held responsible for their acts; and, to the attainment, within the tort system, of a large part of what the advocates of social insurance wish to achieve.

There are those who tend to scoff at some of these values and are thus not influenced by them in forming their views of the desirability of change. But even so the questions of change to what, and how, loom large. All of the proposals that have been subjected to critical analysis have been found to have serious internal deficiencies of one kind or another. None of the proposals for important change have reflected enough appreciation of the values in moderation or the extreme difficulties that adhere to attempts to make drastic change. None preserves the values of our present system of ascertaining damages. There has been almost no attempt to measure whether the changes in the system that have occurred have or have not kept up with changing public expectations. We suspect that the gap between such expectations and performance is, so far as the negligence law is concerned, not large now and is being narrowed as liability insurance becomes more widespread, as new coverages develop, as old legal doctrines are brought up to date, as court delay is reduced, as trials are streamlined, as settlement practices improve, and as the trial bar becomes more expert and more responsive to its responsibilities.

This generation has not failed to assess the influence of the automobile, nor the extent to which our lives and skills have adapted to its presence. The tort law (and its by now inseparable companion, liability insurance) is in the process of solving the problem of providing protection against the dangers of the automobile age by way of prevention and by way of caring for its victims. And if this report is all that we hope it will be, these objectives will be further advanced.

The final verdict of history has not yet been written.

III. THE CRITICISMS OF THE PRESENT SYSTEM

Introduction

The present automobile accident reparations system is called the "fault system", sometimes the "automobile tort system". Comprehensive definition is not usually attempted, but the following statement will be useful, although it omits specific reference to an important characteristic, namely, that the system depends upon an adversary method under which the testimony of the parties and the witnesses is subject to testing by cross examination:

"...A system (a) which determines the existence of liability on a case-by-case basis, (b) usually with a jury, (c) on the basis of certain general indicia of behavior more or less subsumed under a standard defined in terms of what a reasonable man is presumed to be able to foresee and do, (d) under which liability can be insured against, and (e) under which assessment of the extent of liability depends primarily on the extent of damages caused rather than on the degree of wrongdoing by the party held liable. . .may be either a comparative or a contributory negligence system."¹

There is criticism of the present system. Criticism of established institutions is not new, and to the extent to which it is part of a never-ending search for the improvement of those institutions, it should be welcomed.

To what degree the criticism reflects general public dissatisfaction is difficult to say. Some of the statements made to the Committee assert that the general public agrees with the fundamental concept that only those at fault should be held responsible for the payment of damages. It is said that there is a growing impatience with permissiveness and a deepening demand for placing of consequences upon those who do not satisfy the demands and needs of society for orderly and responsible conduct. Others assert that those who are injured want and expect to be compensated for their injuries without any question being raised as to who was to blame for the accident.

Any system that involves such questions as who was at fault, how much are injuries worth, who is telling the truth, and how much insurance should cost will inevitably produce disappointments and differences of opinion. Those on the losing side are scarcely to be expected to refrain from complaining. Not all of these disappointments would be avoided by a shift to a "no fault" or any other new system. While legal institutions must reflect public desires and expectations, we are not relieved of the burden of determining for ourselves which criticisms are valid and which merely reflect the temporary grumblings

¹ Calabresi, Does the Fault System Optimally Control Primary Accident Costs, 33 LAW & CONTEMP. PROB. 428, 429 (1968).

associated with the resolution of disputed questions.

Statement of Criticisms

At this point, we set forth a list of the usual criticisms of the present system without any effort to separate the valid from the invalid or the correctable from the uncorrectable. In later sections we shall indicate which of these we regard as valid and present specific proposals for remedial action.

1. There is too much delay in getting payments into the hands of the injured person. Some of this is caused by court congestion and problems associated with judicial selection and court administration, but the automobile-tort-insurance system is to blame because it clogs the courts. (See pages 23-67)
2. Fault determinations are unreliable. The time and distance relationships involved in many accidents are complex. Witnesses and parties are often unable to testify accurately about the accident. They are influenced by self-interest, pride and suggestions. Sometimes, when the stakes are high, prejury is viewed as a necessary expedient. Juries can't cope with these difficulties. (See pages 68-74)
3. The doctrine of contributory negligence is antiquated, harsh and unrealistic. Therefore, it is largely ignored. The result is an intellectually dishonest basis for verdicts and damages. (See pages 74-78)
4. Common law doctrines of immunity are antiquated. While some of these doctrines are being discarded, they are still part of the law in many states. For example: (a) sovereign immunity; (b) charitable immunity; and (c) intrafamily immunity (claims between husband and wife, and between parent and child). (See pages 79-86)
5. Guest statutes, which relax the standard of care owed by the host owner or driver to his guest, are unfair and should be repealed. (See pages 86-87)
6. Rules for ascertainment of damages are not satisfactory because, among other things: (See pages 87-97)
 - (a) A lump sum cannot properly take into account all future contingencies, and persons who receive large judgments or settlements in a lump sum often handle the money imprudently.
 - (b) There is no objective standard to measure the damage value of pain and suffering.
 - (c) Benefits from "collateral sources" have become widespread. But the collateral source rule still prevails,

sometimes leading to overcompensation.

(d) Awards of compensatory damages are not subject to income tax, but juries are not instructed of this fact and sometimes add amounts to offset the nonexistent taxes.

7. Those with minor injuries tend to receive excessive awards, but those seriously injured are inadequately compensated, usually only after controversy and delay, or sometimes recover nothing. (See pages 97-104)
8. Often the amount of recovery for wrongful death is so limited by statute as to leave survivors inadequately provided for. (See pages 95-96)
9. Insurance costs are too high, victims receive too small a share and the costs of administering our present system, including the cost of legal services, are too high. (See pages 105-119)
10. "Gap problems" continue to exist. Too often a judgment for damages sustained in an automobile accident is not fully collectible because of no insurance, or inadequate limits, or insolvency of an insurer. (See pages 120-127)
11. The "deterrence" idea is no longer valid. When personal determent to the defendant is no longer present, deterrence does not occur. (See pages 127-132)

Complaints as to insurance practices appear to be much more prevalent than complaints about the legal system.² It is our belief that criticisms of insurance rates, underwriting, cancellation practices, coverages and claims practices should be differentiated from those relating to the legal system. Nevertheless, there is no denying that the two sets of complaints mesh and interrelate at several points.

The interrelationship exists (it is alleged) because shortcomings within the legal system bring about higher than necessary costs of liability insurance. These costs have risen to the point that some rate regulatory authorities are reluctant to grant needed rate increases. When rate increases are held back, some insurers find it advisable to become more selective in their underwriting. This means that people in risk categories regarded as less than desirable have

² According to a May 24, 1968, news release from the Insurance Information Institute, public opinion surveys made by the Opinion Research Corporation of Princeton, New Jersey, show that when complaints made by the public are analyzed and classified about three fourths of them related to cancellation of insurance policies, refusal to renew, or difficulty in buying insurance through normal channels. One third of the complaints related to claims--either first or third party.

some difficulty in buying insurance. To supply this market, "high risk" companies come into being, and some of them become insolvent. Dissatisfaction spreads, and pressure against rate increases becomes even greater.

One of the underlying causes, so the analysis runs, is the high, and in respect to small cases artificially high, cost of settling claims. Claims costs are high, it is said, not only because of inflation but also because of cumbersome and expensive legal procedures, delay in courts, pressure from over-busy judges to get cases settled and the high cost of legal services.

We can understand, though we do not agree with, the thinking of those in insurance ranks who would solve their problems by abolishing the tort law, modifying present rate regulatory laws and making a fresh start with a new system.

Our responsibility does not include giving advice to the insurance companies as to how to solve their special problems of successful operation under present rate regulatory laws. We do accept as part of the responsibility of the Bar the imperative need to solve the problems of delay in the courts. We hope that what we have to say on this topic will be acted upon and will be a meaningful contribution. We also regard it as incumbent upon the Bar to act affirmatively to modify or discard rules which have outlived the reasons for their existence, to examine proposals for change and generally to seek to improve and perfect the automobile accident reparations system.

IV. COMMENTS, CONCLUSIONS AND RECOMMENDATIONS AS TO EACH OF THE LISTED CRITICISMS AND OTHER MATTERS.

	Page reference to text
1. Delay in the Courts (see outline, page xiii-xv)	
2. The Reliability of Fault Determinations - complexity, dishonesty, etc.	69-74
3. The Doctrine of Contributory Negligence and Related Matters	74-79
4. Immunities	79-86
5. Automobile Guest Statutes	86-87
6. Rules for the Ascertainment of Damages	87-96
The Collateral Source Rule	90
Income Taxes on Damage Awards	92
Amount of Recovery for Wrongful Death	95-96

	Page reference to text
7. The Uncompensated Person ("The cross over medical plan")	97
The Overcompensated Person (The "Quick Settlement Option")	100
The Undercompensated seriously injured person	103
8. Costs	
A. Insurance Costs	105
B. Costs of Legal Services	110
(1) The Contingent Fee	
(2) Fees for the Defense of Cases	
9. "Gap Problems"	119
A. The Insurance Gap	120
B. The Insolvency Gap	125
C. The Limits of Liability Gap	126
10. Deterrence	127
11. Absence of Criticism of Certain Important Functions of the Present System	132

IV. COMMENTS, CONCLUSIONS AND RECOMMENDATIONS AS TO EACH OF THE LISTED CRITICISMS AND OTHER MATTERS

1. DELAY IN THE COURTS

(See outline p. xiii to xv)

A. Introduction

The Committee does not believe that its function includes making a full study of delay in the courts and how it can be cured, nor of the related subjects of judicial selection and tenure, court administration, and the compensation and discipline of judges. Nevertheless, the problem of prompt and fair reparations for automobile accident victims is so intertwined with these subjects that it is unwise to come to conclusions without consideration of these related problems.

For more than a century¹ eloquent and powerful voices have warned that delay in the trial of cases can become, and in some places has become, so bad that justice is foundering under the load. If, as we all surely believe, "The heart of everything that government seeks to build and defend" lies in the promise of justice², it is not easy to understand why the elimination of excessive delay and the selection of able judges should not be at the top of any list of urgent goals, state or national.

The leaders of the American Bar have demonstrated their keen and constant perception of the overwhelming and fundamental importance of these subjects. In 1906, Roscoe Pound, in his speech to the American Bar Association calling for court reform, warned that "delay and expense. . . have created a deep seated desire to keep out of court, right or wrong, on the part of every sensible businessman in the community."³ In 1958, more than a half century later, a period which saw many reforms instituted and much earnest effort expended, Chief Justice Earl Warren made his much quoted statement that "Interminable and unjustified delays in our courts are compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States." He might have added, as Professor Rosenberg did in 1965, that "Delay breeds cynicism about justice. We become used to the wrong and accept it."⁴

Clearly, the effort to achieve reform and improvement has not been sufficient to achieve its goals. Yet it has been persistent and, in the main, well conceived. Even though much of the recent history of the effort is known to every concerned member of the American Bar

¹ In 1839 David Dudley Field, in A Letter to Gulian C. Verplanck said "Speedy justice is a thing unknown; and any justice, without delays almost ruinous, is most rare". Quoted in VANDERBILT, THE CHALLENGE OF LAW REFORM, 81 (1955).

² Banks, The Crisis in the Courts, FORTUNE, December, 1961, at 86.

³ The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. REP. 395, 408-409 (1906).

⁴ Rosenberg, Court Congestion: Status, Causes, and Proposed Remedies, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 29 (Jones ed. 1965), reprinted in DOLLARS, DELAY, AND THE AUTOMOBILE VICTIM 151 (1968).

Association, a brief resume of certain aspects of the history will be useful.

The Merit Plan

In 1937, the Association adopted a resolution that the merit plan for the selection and tenure of judges (sometimes called the Missouri Plan, the American Bar Association Plan, or the American Judicature Society Plan) was the most acceptable way to "take the state judges out of politics as nearly as may be." This plan, initially proposed by the American Judicature Society, has been consistently supported by the Association and by other groups interested in improving the process of selecting judges. Missouri adopted the plan in 1940 for some of its courts. Progress in the next two decades was rather slow. Now there is a spurt:

"...starting in 1962, the merit plan was adopted by Constitutional Amendment for both selection and tenure in Iowa, Nebraska, Colorado, Vermont, and Oklahoma, for tenure in Illinois, and for selection in Utah. In Dade County, Florida, a merit selection and tenure plan was instituted by amendment to the Home Rule Charter after a favorable vote at the polls. The Governor of Minnesota operates under a merit selection plan which he introduced by executive action, and the Mayor of New York City does the same as to the judges he appoints. There are now 15 states which have merit plans for selection, for tenure, or for both, for some or all of their judges, and 8 in which the plan applies to both selection and tenure. In addition, a merit selection and tenure plan has been approved by the Idaho legislature and will come up for voter approval this year; the Maryland Constitutional Convention, which is currently in session, has passed such a plan on first reading; and the Pennsylvania Bar Association, with considerable citizen support, . . . presented a similar plan to the Pennsylvania Constitutional Convention, . . . after the plan had been endorsed in a Statewide referendum of the members of that Association. In numerous states such plans are in various stages of consideration."⁵

⁵ Report of the American Bar Association Standing Committee on Judicial Selection, Tenure and Compensation, February, 1968. The report refers to the status of the merit plan as of the end of 1967. See also, Winters, The Merit Plan for Judicial Selection and Tenure--Its Historical Development, 7 DUQ. L. REV. 61 (1968). The American Judicature Society publishes an informative booklet, Texts of Provisions for Merit Plans of Judicial Selection. See also, The Extent of Adoption of the Non-Partisan Appointive-Elective Plan for the Selection of Judges (American Judicature Society Report No. 18, November, 1967). Persons experienced in the work of judicial nominating commissions have held a workshop. The Ins and Outs of Judicial Selection: First Workshop for Nominating Commissions, 51 JUDICATURE 62 (1967). See also, Hunter, The Judicial Nominating Commission, 52 JUDICATURE 370 (1969).

The plan itself is evolving⁶, and the essential concept of the selection of judges based on merit is gaining wider acceptance year by year.⁷ The plan is incorporated in the Association's Model Judicial Article for State Constitutions and in the National Municipal League's model state constitution. But, 17 states still elect all their judges (nine on partisan ballots and eight on non-partisan ballots) and 20 other states elect some of their judges. In four states judges are selected by the legislature.

Much remains to be done.

The American Bar Association's Recommendations on Court Procedure

In 1938, the Section of Judicial Administration presented and secured the adoption of a comprehensive set of recommendations on court procedures, judicial administration, trial practice, selection of jurors, appellate practice, and other related subjects. This was a landmark report of a group of seven committees, the chairman of each being a recognized expert in the field of work dealt with by his committee. The advocacy of these proposals was made a special program of the American Bar Association.

The program set forth in these recommendations has become known as the Minimum Standards of Judicial Administration, and in 1949 a book with that title, edited by the late Arthur T. Vanderbilt, embodied the results of a survey to determine the extent to which the standards had been put into operation by the states.

This 20-year-old report and the book are still invaluable sources of information and advice. But again, much remains to be done.

"Ten Cures for Court Congestion"

In 1959, a Special Committee on Court Congestion recommended the publication of a pamphlet, "Ten Cures for Court Congestion." Notable, among other reasons, for its practical approach in undertaking to present measures that had been employed successfully in actual practice,

⁶ The Pennsylvania plan, to become effective if approved by the voters in the May, 1969, election, illustrates the sort of evolution that is occurring. Similar to other plans but identical to none, it reflects efforts to combine the best features of other plans. The nominating commission, called the Judicial Qualifications Commission, consists of four laymen appointed by the governor and three members of the bar appointed by the supreme court, with not more than four members to be from the same political party. When a vacancy occurs on the bench of a statewide court, the commission submits ten to twenty names of qualified persons to the governor, who appoints from that list.

⁷

1967 ANNUAL SURVEY OF AMERICAN LAW 675-677.

for its emphasis on the essential role lawyers themselves must play in seeking solutions to problems of court congestion, this pamphlet enjoyed a distribution of 10,000 copies.

It must be accorded high praise as an effort to stimulate effective action, although not all its recommendations withstood critical analysis by members of the academic community.⁸

Other Publications

The Improvement of the Administration of Justice is the title of a handbook prepared originally in 1948 by the Section of Judicial Administration and brought up to date from time to time as new editions became necessary. It is a valuable source of authoritative information concerning the A. B. A. programs and the progress made. The most recent edition, the fourth, became available in 1961.

Since 1913, the American Judicature Society has been promoting the efficient administration of justice. Some 60 publications are available from it dealing with a wide range of judicial and related subjects, including ten items on selection and tenure of judges. Special attention is directed to the brochure "Consensus of the National Conference on Judicial Selection and Court Administration."

The Institute of Judicial Administration publishes an annual list ranking the nation's leading courts according to length of delay.

Columbia University's Project for Effective Justice has presented illuminating studies.

At the University of Chicago Law School research groups have been working for several years on a study of the jury system. From this grew a project to study court congestion, which produced the notable book, Delay in the Court, by Zeisel, Kalven and Buchholz.

Section and Committee Reports

Anyone who wishes to understand the breadth and scope of the effort of the American Bar Association in working to improve the administration of justice should study the reports of the sections, especially those of the Section of Judicial Administration, and the reports of the various special and standing committees that are involved in the work. We select for brief comment the work of the Standing Committee on Federal Judiciary and the Standing Committee on Judicial Selection, Tenure and Compensation.

The Standing Committee on Federal Judiciary has made reports to the House each year since 1952, setting forth what was being planned

⁸ ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURT (1959); Rosenberg, supra note 3.

and accomplished. These reports constitute a running recital of the tremendous contributions of the Association, through that committee, in regard to federal judicial appointments.

In 1961, Louis Banks, writing in *Fortune* under the title "The Crisis in the Courts", said, ". . .the United States owes more than it knows to a gutty Philadelphia corporation lawyer, Bernard G. Segal. . . ." It was this committee (under the chairmanship of Mr. Segal) that brought about the practice, begun under President Truman and continued ever since, of submitting names of candidates for the federal judiciary to the A.B.A.'s committee for grading, in advance of public announcement. In August of 1968 the chairman of that committee was able to report that during the past three years no person found not qualified by the committee had been appointed to the federal bench. President Nixon, early in the campaign, stated that he would "solicit and value the expert and objective advice" of the committee.⁹ This program should command the support of all state and local bar associations.

A recommendation of the Committee on Judicial Selection, Tenure and Compensation, adopted by the House of Delegates in February of 1966, urges state and local bar associations to initiate and pursue "a program for obtaining commitments from the Senators. . . from all candidates for the United States Senate in which they agree to cooperate in the program whereby the President of the United States, through the Attorney General, refers to the Standing Committee on Federal Judiciary of the American Bar Association for investigation and report, persons under consideration for nomination as judges in the Federal Courts, and to withhold support from any person reported by the committee to be not qualified for such nomination."

The Committee on Judicial Selection, Tenure and Compensation, among other notable accomplishments, has laid the groundwork for the establishment of or the extension of somewhat similar participation by state and local bar associations in the process of selecting members of the state courts. Its February, 1968, recommendation contained a resolution urging all state and local bar associations, as a matter of professional responsibility, to initiate, expand or intensify active programs with the objective of elevating to judicial office judges and lawyers who have demonstrated high qualifications and of retaining in judicial office judges whose record of performance is satisfactory.

The resolution also urges each state and local bar association

⁹ An Editorial, 55 A.B.A.J. 48 (1969), comments on this commitment and also directs attention to a 1958 resolution of the House of Delegates of the American Bar Association proposing that an independent commission be established as an agency of the President's office "to advise with the President on appointments, and to receive from outside sources and from all segments of the organized Bar, suggestions of names of persons deemed highly qualified for appointment as judges."

which has not done so to establish adequate by-law provisions defining the procedures for the association's participation in judicial selection.

This report contains a wealth of information on the work of the Association and of its Committee on Federal Judiciary, as well as on the work of the Committee on Judicial Selection, Tenure and Compensation. A model set of by-laws is set forth as Appendix C of the report. These by-laws provide a detailed and specific plan of active participation by the bar in the selection and retention of qualified judges. If they were adopted and implemented, a great step would have been taken to assure a highly qualified judiciary for the state courts.

Removal, Discipline and Retirement of Judges

Even the best plan for judicial selection will not solve the problem created by the judge who is suffering from a decline in his abilities but who does not desire, for financial or other reasons, to retire from his position. Clearly, some way to bring about the retirement of such a judge is needed.

This and related problems are under careful study undertaken as a result of a recommendation of the Section of Judicial Administration approved by the House in August, 1965. The resolution was that, the council of the section and the Committee on Judicial Selection, Tenure and Compensation, with the collaboration of the Committee on Federal Judiciary and the Committee on Traffic Court Program, be "authorized to undertake a comprehensive study of the problems relating to the aged, the ill or otherwise infirm. . .judge or the. . .judge who for other reasons is not carrying out his judicial responsibilities;. . .such study shall also include the problem of voluntary retirement. . ."10 The American Bar Foundation is conducting the study.

Attempts to cope with the subject of removal, discipline and retirement received sharp impetus from the adoption in 1960 in California of a constitutional amendment creating a commission, consisting of judges, lawyers and laymen, charged with the duty of receiving, investigating and considering complaints as to the conduct of any judge. If judicial misconduct is found but not such as to justify discipline, the commission so advises the judge in the hope that this will bring about improvement. If more serious judicial misconduct is found, a suggestion is made that the judge resign. If he does not, a hearing may be ordered, following which a recommendation may be made to the Supreme Court.

On recommendation of the commission, the supreme court may retire a judge for disability or may censure or remove him for action constituting willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance or conduct that is prej-

10 90 A.B.A. REP. 337-339, 446-447 (1965).

udicial to the administration of justice or which brings the judicial office into disrepute. The rules provide for confidentiality. The supreme court may suspend a judge, without salary, if he pleads guilty or is found guilty of a crime punishable as a felony or of any crime involving moral turpitude under state or federal law.

During the first four years of its existence, the commission received 344 complaints. There are somewhat more than 1,000 judges in California.

There are, of course, other ways of dealing with judicial misconduct; e.g., impeachment, which is the sole remedy as respects federal judges, but they operate less well than the California method.

We understand that Colorado, Florida, New Mexico, and Texas are considering proposals similar to the California plan. New York uses a specially constituted "Court on the Judiciary."

By constitutional amendment adopted in 1966, the Oklahoma "Court on the Judiciary" is vested with sole and exclusive jurisdiction to hear and determine cases arising under the article creating it. In addition to previous methods, any judge is subject to removal or to compulsory retirement for specified reasons, including incompetence to perform his duties, "gross partiality," etc.

The recent Maryland proposals included the creation of a "Commission on Judicial Disabilities" having powers similar to those of the California commission. The Indiana proposals, which were somewhat similar to those in Maryland, were accepted by the legislature in 1967.¹¹

The Michigan "Judicial Tenure Commission", established by the Michigan Constitution of 1968, consists of nine members selected for three-year terms. Four members are judges elected by the judges of the courts in which they serve--one court of appeals judge, one circuit judge, one probate judge and one judge of a court of limited jurisdiction. Three members are elected by the bar, of whom one is a judge and two not judges. Two nonlawyer members are appointed by the Governor. Terms are staggered. On recommendation of this commission, the supreme court may censure, suspend, with or without salary, retire or remove a judge for conviction of a felony or for physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court makes rules implementing the section and providing for confidentiality and privilege.

¹¹ For details, see 1966 ANNUAL SURVEY OF AMERICAN LAW 744-745 and 1967 ANNUAL SURVEY OF AMERICAN LAW 684-693.

The Illinois Judicial Article (Article VI of the Illinois Constitution), which became effective January 1, 1964, contains a section enabling the state legislature to provide by law for the retirement of judges at a prescribed age and to provide that subject to rules to be prescribed by the Supreme Court, and subject to notice and hearing, any judge may be retired for disability or suspended without pay or removed from office "for cause" by a commission composed of one judge of the supreme court, selected by that court, two judges of the intermediate appellate court, selected by that court, and two circuit judges selected by the supreme court. The commission is convened by the chief justice on order of the supreme court or at the request of the state senate. The general assembly has enacted a Compulsory Retirement of Judges Act.

Delay as a Source of Danger to Our Present System

In spite of all the wonderful plans and the great and accelerating progress, why do we still have the problem of delay? Part of the answer may be that a large part of the recent effort at the highest levels of the American Bar Association has not been pointed directly toward the matter of delay in the state courts, but rather has emphasized the problem of securing highly able judges, especially on the federal bench, of securing proper salaries for those judges and of finding satisfactory methods of discipline and removal.

The earlier efforts were pointed strongly toward the need for efficient judicial administration and for procedural improvements. They were not devised in the absence of an awareness of the critical importance of the delay problem. They were predicated on the belief that enough could be gained from those efforts to enable the courts to reduce their backlogs and keep up with the increasing flood of new cases.

We do not detract in any respect from these efforts when we point out that the problem of delay is still too much with us.

Direct attacks earlier, in the form of strong assertions of need for additional judges, would not have come with good grace from a bench and bar that had not worked hard and long at increasing the efficiency of the existing machinery. For this and other reasons, we do not complain of the order in which the various efforts were made. Some of us have observed how the persistence of political motivations in selecting judges can defeat or delay for many years the success of legislation providing for additional judges.

It would be too simplistic to heap the blame for delay on the vast increase in automobiles and their use and on the accidents in which they are involved. But the fact remains that in many of the backlogged courts a large proportion of the waiting cases are automobile

cases, and what may be of even greater practical significance, there is a widespread impression, partly myth, but perhaps not an eradicable myth, that the automobile accident cases are to blame. Thus, many think that if some way could be found to remove those cases from the courts, the not so imperceptible corrosion of the foundations of justice that Chief Justice Warren referred to would cease and the cynicism that afflicts us would become less serious.

Parts of the trial bar have been engaged properly, in some efforts to separate fact from myth, to make the point that the automobile is not by any means the only cause of the "law explosion" and the resultant inability of many courts to cope with their workloads.¹² Still, some of those who propose drastic changes in the way automobile cases are handled point to an alleged substantial reduction in the number of cases that must be tried as a reason their plans should be adopted. We do not think that this reasoning is valid, but we must concede (indeed, we assert) that it has sufficient plausibility to enough people to create a significant threat to the continuation of the present tort system for handling automobile cases.

Another danger is the accumulated grievances suffered by members of the general public from the continued existence of delay, the occasional lazy, incompetent, biased or political judge, the dingy courtroom, the sloppy management, the long summer recess, the short court day, the inconsiderate bailiff, the outraged doctor, or party, or juror, or witness, kept waiting too long. This danger is not to the tort system alone but to the entire American system of justice.

It is not enough for tort lawyers merely to absolve themselves from some of the blame. It is imperatively in their own self interest for them to become the protectors, the defenders, and the improvers of the system.

Perhaps part of the difficulty in doing the things we know we should do is that the effort has been too unselfcentered--too much a matter of the general good and not sufficiently a matter of particular lawyers protecting their own particular interests. They need to sense that the individual economic interests of lawyers can best be preserved not merely by defending old habits, but by a renewed realization that the proper administration of justice is indeed the "heart of everything" that all of us wish to build and defend.

Beyond calling upon tort lawyers everywhere to support the program and policies of the American Bar Association and to enlist some of their energies in the cause of reform and improvement of the administration of justice and again bringing to their attention the wealth of information available, we wish to stress certain beliefs and ideas that seem to us to be either especially useful as related to the problem of delay or to deserve wider application.

¹² Ross, Defense Research Institute Studies Refute Court Delay Claims of Critics, 36 INS. COUNSEL J. 46 (1969).

B. The Extent of Delay in the Courts

We need not go so far as to say that if only court delay is eliminated, other problems will disappear. But there are those who do. Judge Donald T. Barbeau, District Court of Hennepin County, Minnesota, has recently been quoted (The National Underwriter, October 18, 1968) as follows: "There is nothing wrong with the present adversary system of litigation, including auto accident claims, that the elimination of court delay would not solve. It is court delay that causes hardship. Delay brings our courts into disrepute. Delay results in deterioration of evidence through loss of witnesses, forgetful memories and death of parties and makes it less likely that justice will be done when a case is reached for trial."

But we do accept, and we believe it too plain to warrant extensive statement, that an imperatively needed reform is the alleviation of delay-causing congestion in the courts.

How Much Delay Is There?

How much delay is there? Far too much, but it's easy to lose perspective. Professor Rosenberg points out that in New York City, where serious congestion exists, only 14 per cent of those who ultimately received something had to wait more than 24 months.¹³ How long is too long? Many lawyers think that in serious cases that a delay of a year is not excessive and may be desirable. On this point, Professor Rosenberg refers to the opinion of the Judicial Conference that delay is excessive if it exceeds six months and to a finding of a special American Bar Association committee that six months was too strict a standard and that a court had a delay problem when the "lapse between filing and judgment exceeds two years."¹⁴

For years some persons have pointed to auto liability suits as a major cause of court congestion. "Take auto accident cases out of the courts and there won't be any congestion," these critics have argued. There is, however, a considerable basis for an opinion that automobile liability cases are not the chief cause of delay in the courts.¹⁵ But excessive delay does exist, especially in metropolitan areas. This problem must be brought under control.

Delay Is Not Inescapable

It is plain that delay in the courts is not an inescapable result of the fact that motor vehicle tort cases are numerous and are usually

13 Rosenberg, supra note 3, at 34.

14 Ibid.

15 See Ross, supra note 11.

tried by the courts of general jurisdiction. One has only to consider the fact that in many localities, even many of those having a population of more than 500,000, the time from service of answer to trial is under 12 months, and in some of these places less than six months.¹⁶ Surely, ways are available and must be used to make court delay a mere unhappy memory.

WHERE COURTS ARE HAVING DELAYS IN PERSONAL INJURY SUITS

Court, County (City) State	Population (000)	1966	1967	1968
		months of delay		
1. & 2. Circuit Court, Cook (Chicago) Ill.: County Dept. (Law Division) Municipal Department	5,129	69.5 56.4	64.3 63.6	60.6 65.2
3. *Court of Common Pleas, Philadelphia, Pa.	2,002	50.8	54.1	54.4
4. *Supreme Court, Suffolk (Riverhead) New York	666	48.2	52.0	57.7
5. *Supreme Court, Bronx, N.Y.	1,424	42.6	49.4	50.1
6. *Supreme Court, Kings, (Brooklyn) N.Y.	2,627	50.5	49.3	47.3
7. *Supreme Court, Queens, N.Y.	1,809	46.8	48.4	48.5
8. *Supreme Court, Nassau (Mineola) N.Y.	1,300	45.8	45.1	43.5
9. *Superior Court, Suffolk (Boston) Mass.	791	38.0	45.0	46.0

*Counties with courts of limited jurisdiction, handling small-claim, personal injury cases thus increasing the average period required for cases in courts of general jurisdiction.

¹⁶ Waybright, An Experiment in Justice Without Delay--A Tale of Three Florida Counties, 52 JUDICATURE 334 (1969).

COURTS IN JURISDICTION OF MORE THAN
500,000 WITH DELAYS OF LESS THAN A YEAR

Court, County (City) State	<u>1966</u>	<u>1967</u>	<u>1968</u>
1. Court of Common Pleas, Delaware (Media), Pa.	4.3	5.1	4.3
2. Circuit Court, Multnomah (Portland), Ore.	5.0	6.1	4.1
3. *Circuit Court, Dade (Miami), Fla.	6.5	8.5	10.6
4. Court of Common Pleas, Summit (Akron), Ohio	9.5	9.5	7.7
5. District Court, Bexar (San Antonio), Texas	12.4	10.9	----
6. *District Court, Dallas, Texas	13.7	11.2	----
7. Circuit Court, Jefferson (Louisville), Ky.	16.6	11.5	11.7

*Population over 750,000

Source: Institute of Judicial Administration

In some jurisdictions, courts are managing to hold their own in the battle against delay in the courts. In the Miami area, for instance, the average delay in a personal injury suit is only 10.6 months. However, in the Bronx, New York, it can take 50.1 months. One good reason for the statistical divergence is that in Miami there is one judge for every 50,000 people. In the New York metropolitan area, one judge may serve up to 200,000 people.

Delay Is A Threat To The Present System

If changes in the present tort system are to be made, it would be desirable if they could contribute to the relief of court delay. But this is not the same as believing that court congestion in and of itself is a reason for changing the tort basis for recovery. Courts are congested when they have more business than they can handle. The "law explosion" is the consequence of the "population explosion", and the blame should not be placed solely on the increase in the number of automobile accidents.

Congestion exists in all types of courts, not only in those that try automobile cases. Some traffic courts are trying to handle 200-300 cases per day. In the United States Supreme Court the work load has tripled in the last 15 years. Does the increase in the business of the courts supply a solid reason for changing our basic laws? We don't think so. But we do think that the continued existence of excessive delay supplies a basis for severe criticism and thus constitutes a threat to the continuation of the present system for handling automobile accident cases.

C. Major Basic Steps to be Taken in Seeking to Relieve Delay in the Courts

(1) Court Re-organization--Court Administration--Selection and Tenure of Judges

(a) A Unified Court System

Other things being reasonably equal, the unified, well-administered court will have less of a problem in keeping its workload under control than other courts. But even if this were not so, a plea for a direct attack on the delay problem by adding more judges would not be likely to gain sufficient support unless the underlying steps to make the best use of existing courts and judges had been taken. Thus, from the point of view of those especially concerned with delay, as well as from the point of view of those who have as paramount in their thinking the general need for reform and improvement, an underlying necessity is a "unified court system, with power and responsibility in one of the judges to assign other judges to judicial service so as to relieve congestion of dockets and utilize the available judges to best advantage."¹⁶ As proposed in the American Bar Association Model Judiciary Article for State Constitutions, a model court system for a populous state would comprise, at the most, a four-tiered structure: (1) A court of final resort; (2) an intermediate court of appeals; (3) a trial court of general jurisdiction; and (4) magistrates courts.

¹⁷ Quoted from the resolution proposing the merit plan, 63 A.B.A. REP. 523 (1938).

(b) Court Administration

The goal of court administration is the efficient use of existing judicial manpower. It is necessary that adequate statistics be kept and be readily available if the effort to administer the court is to have a solid foundation.

The essential elements of a system for court administration are: (1) Judicial statistics;¹⁸ (2) power to assign judges to even out workloads; and (3) a court administrator.

This last need is especially marked in those places having many courts and particularly if the jurisdiction of those courts overlap. In many places the time has come when the application of modern management skills and techniques is essential. The presiding or administrative judge should be enabled to assign to the administrator a complex of housekeeping and managerial chores that, in some places, have become so numerous and bothersome as nearly to preoccupy the judges and detract from their ability to do their other work.¹⁹

If court administrators did nothing more than devise efficient and effective ways to avoid calendar gaps, to get lawyers, witnesses and parties to court on time (but not too much ahead of time), to keep the papers flowing smoothly and to provide a system that enables the court to appraise the results of various expedients and to know how its time is being spent (and how badly new judges are needed), the net result would be eminently worthwhile. But much more can be expected: ways of identifying cases that are nearly certain to persist into, if not through, trial; identifying cases in which impartial medical witnesses ought to be employed; computerized court calendaring;²⁰ pushing cases destined for settlement toward the "moment of truth." All this and more can be attained under the management of a skilled court adminis-

18 The Administrative Office of the United States Courts has a pamphlet, "Instructions for Preparing Statistical Reports," and the Institute of Judicial Administration publishes "Publication of Judicial Statistics." Statistics are in Cure Eight of the "Ten Cures for Court Congestion" pamphlet.

19 There is a Model Court Administrator Act, 9 U.L.A. 253. It was adopted in Michigan with variations and additions in 1952. It takes into account the federal legislation creating the Administrative Office of the United States Courts.

20 Davidson & Davidson, Computerized Court Calendaring, 54 A.B.A.J. 1097 (1968); Adams, A Lawyer's Introduction to Computers, 51 JUDICATURE 99 (1968); Freed, Computers in Judicial Administration, 52 JUDICATURE 419 (1969).

trator.²¹

We have noted with interest the report in the November, 1968, issue of *Oyez! Oyez!*, the bulletin of the Section of Judicial Administration, that in the first six months of 1968 the U.S. District Court for the Eastern District of Pennsylvania terminated more cases than were filed for the first time in sixteen years. Chief Judge Thomas J. Clary gives a large part of the credit to a computer-made analysis of the court's calendar showing that longshoremen cases had increased without a corresponding increase in the termination rate of those cases. The blame for contributing unduly to congestion was placed on certain law firms being too busy with these cases.²² It is also reported that computer analysis by caseload of attorneys showed that certain lawyers were so busy that they could not prepare their cases on time.

The article in *Oyez! Oyez!* also states that in Los Angeles a computer is being used with great success in scheduling cases for trial so that there will be an almost perfect flow. If such results can be achieved elsewhere, the contribution to court congestion arising when counsel are unavailable for trial because engaged in another court will be lessened. The frictions that develop when judges find it necessary to exercise their power to force counsel to proceed will be alleviated.

Sometimes, stern measures to assure the availability of counsel when the case is ready have been regarded as a "cure" in themselves for court congestion.²³ Attention is often directed to the "concentration" of cases in a relatively few law firms. While we do not doubt that lawyers ought to arrange their affairs so as not to inconvenience courts and their fellow lawyers, or that courts have the power to deny a continuance when counsel is otherwise engaged,²⁴ we hope that ad-

²¹ Woelper, *Work of the Modern Administrator of Courts*, 287 ANNALS 147 (1953); Klein, *The Position of the Trial Court Administrator in the States*, 50 JUDICATURE 278 (1967); *Report of the Chief Court Administrator, Superior Court of Connecticut*, March, 1969.

²² On the other hand, see Zeisel, *Court Delay Caused by the Bar?* 54 A.B.A.J. 886 (1968), in which the author concludes that "at least for the time being, no good case can be made for a court's concern with the concentration of cases in the hands of certain members of the Bar unless, of course, it wants, for reasons of its own, to keep a red herring handy." But there was a quick riposte from a trial judge: Tauro, *Court Delay and the Trial Bar--One Judge's Opinion*, 52 JUDICATURE 414 (1969).

²³ They were in *Cure Two of the "Ten Cures"* pamphlet.

²⁴ *Gray v. Gray*, 6 Ill. App. 2d 571, 128 N.E. 2d 602 (1955). See ZEISEL, KALVEN & BUCHHOLZ, *supra* note 7, ch. 17, in which the authors consider the question of whether and how much "concentration of the trial bar" contributes to delay.

vances in the art of scheduling cases will make resort to this ultimate weapon less frequent.

An American Bar Association Journal article²⁵ proposes a computerized calendaring system for the six-county San Francisco Bay area. It points out some of the problems and limitations as well as the possible benefits. It includes a discussion of the need for discretionary decisions even after the machine had done its work, the possibility (discounted as more imaginary than real) of "cases moving endlessly about in utter confusion," how the open time (that might be produced by cases taking longer to try than anticipated or by unanticipated discrepancies between the number of cases actually tried and the expected number, during the "lock-on" period) could be used by the judge in chambers. A model of the system proposed for San Francisco is being planned for testing at the University of Kansas.

Apparently, computerized calendaring is something for serious consideration and study by court administrators and judges. Its feasibility might be limited to metropolitan regions, where there are a large number of courts accessible to many attorneys. Here there are many calendar conflicts, and the management of these conflicts so as to produce a smooth flow of cases is one of the purposes of the system.

(c) Merit Selection of Judges

As noted in the introduction to this section, much has been done and is being done to assure the selection of able judges. While much of this work has been as a part of the quest for a general improvement in the quality of the judicial process, it also bears on the problem of delay and deserves the support of those who regard the elimination of excessive delay as a major goal.

An able, conscientious judge usually does more work better than one not so well qualified. His calendar is likely to be better managed, his trials under better control and fewer of his decisions are appealed. He "attracts" a larger number of jury-waived cases. His suggestions as to proper settlements are heeded more often. His pre-trials are more productive and waste less time.

(d) Tenure, Discipline and Removal of Judges

Judges should have secure tenure, adequate pay, adequate retirement plans applicable at a stated age or upon disability, and they should be subject to discipline and, if necessary, to removal for good cause, but with safeguards for the protection of both the judge and those who complain about him.

The possible continued presence on the bench of a judge who for one reason or another is not bearing his proper share of the work,

²⁵ Davidson & Davidson, supra note 19.

perhaps by not working enough hours or by not controlling his court and thus allowing time to be wasted, contributes directly to delay.

The traditional method (and sole method as respects federal judges) of securing the removal of a judge is impeachment. It is rarely used. An occasional state will be found in which recall is available; sometimes legislative address is used. These methods are inadequate, chiefly because they do not lend themselves to being used as disciplinary devices and because they are cumbersome.

The Model Judicial Article for State Constitutions, besides impeachment, provides for removal of state court judges, other than supreme court justices, by the supreme court of the state.

The Section of Judicial Administration's Committee on Removal and Discipline of Judges has been working on the matter, especially in relation to federal judges, and the section's Committee on Model Legislation for Judicial Retirement has been deeply concerned also. In August, 1965, the Committee on Judicial Selection, Tenure and Compensation, after meeting with Attorney General Katzenbach, Deputy Attorney General Clark, David Peck, Chairman of the Section of Judicial Administration, and Robert Meserve, Chairman of the Committee on Federal Judiciary, concluded that a comprehensive study of this subject was needed. Subsequently, the House of Delegates authorized the study.

The American Bar Foundation is conducting the study, and the project director is William Braithwaite.²⁶ The objective is to describe the way in which procedures for the removal and retirement of judges operate, to identify the similarities between various procedures in different states and to suggest conclusions as to the most effective methods of dealing with judicial incompetence, misconduct and disability.

Pending the results of this study, how should a state proceed? As noted earlier, California adopted a constitutional amendment in 1960, Illinois in 1964, Oklahoma in 1966, and Michigan in 1968. The California model seems to offer a workable plan, but it may not be feasible to seek a constitutional amendment. Alternatively, and in line with the consensus reached by a 1959 national conference of judges, lawyers and representatives of the public, rules of court may prove to be an easier and less cumbersome method.²⁷ These rules should recognize that

²⁶ He is the author of How Missouri Handles Judicial Disability, 52 JUDICATURE 276 (1969).

²⁷ Such rules are under discussion in Massachusetts now. See minutes of the January 14, 1969, meeting of the Committee on Administration of Justice. It is contemplated that there will be a "Committee on Complaints," composed of three judges and two members of the bar. Complaints would be filed with the Executive Secretary of the Supreme Judicial Court of Massachusetts.

it is the highest court in the state which has the responsibility and the power to discharge it, and they should make provision for dealing with conduct not warranting removal, for the initiation and investigation of complaints before charges are presented, and for private hearings, in the absence of a request from the judge whose conduct is criticized that they be public. Older methods, such as impeachment and legislative address, would be retained.

We believe that states not now having adequate means of dealing with the removal, discipline and retirement of judges should consider a constitutional amendment or some other provision for solving these problems.

Pending the further enlightenment to be anticipated from the A.B.A. Foundation study, we recommend the consideration of such rules under the circumstances stated above.

(2) Shortening the Trial of the Case

(a) Jury Waivers

Usually it takes longer to try a case before a jury than it does to try a similar case before a judge without a jury. The most supportable estimate seems to be that the bench trial is 40 per cent shorter, or stated the other way, the jury trial is 67 per cent longer.²⁸

Assuming that the 1958 position of the American Bar Association in opposition to abolishing jury trials in automobile negligence cases is still the prevailing view,²⁹ we now consider the question of whether much is to be gained from promoting the waiver of jury trials and, in any event, how waivers may be encouraged.

The guarantee of a jury trial contained in the Seventh Amendment of the Federal Constitution is a limitation only on the power of the federal government.³⁰ It does not prohibit the states from restricting the right of civil trial by jury in the state courts or from abolishing it altogether. The parties to a civil action may waive their right to a jury trial or may waive their right to a trial by the number of jurors provided for in a constitution or applicable statute. Sometimes, the waiver may be implied from failure to object to a jury of a different number. Absent constitutional restrictions, the legislature has

²⁸ ZEISEL, KALVEN & BUCHHOLZ, *supra* note 7, at 78 and Table 30. The average jury trial is estimated to take 17.4 hours and the average bench trial, 8.9 hours. The estimated length of the average jury trial if it were tried as a nonjury trial is 10.4 hours--seven hours less than the average jury trial. Seven hours is 67 per cent of the 10.4 hours. Seven hours is 40 per cent of 17.4 hours (10.4 ÷ 7).

²⁹ 83 A.B.A. REP. 171-172 (1958).

³⁰ 50 C.J.S. Juries § 10b.

power to determine the mode of waiver. Under some statutes no particular form of waiver is required. Written stipulations, oral consent in open court, submitting the case to the court, permitting the court to proceed without making objection, submitting the case to arbitration, consenting to a reference to a referee, failing to pay the jury fee, failing to appear, failing to make timely demand, have all been upheld as waivers.³¹

Lawyers, both defendant's lawyers and plaintiff's lawyers, are hesitant to waive a jury trial because they (1) fear being confronted with a biased judge, or (2) believe that a jury trial will produce a more favorable result for the client, or (3) believe that the longer delay, usually attendant upon a jury trial, in itself may improve one's bargaining position. Unless these deterrents are substantially overcome, it is not realistic to expect that jury waivers will occur in a large proportion of cases.

The reluctance to waive a jury can be lessened by the imposition of some detriment, such as a substantial jury fee, or bothersome procedural obstacles on the party who is unwilling to waive. Cure Three of the A.B.A. pamphlet was captioned "Jury Waivers." It suggested that use of the Los Angeles plan or the New York plan in other jurisdictions would help. The Los Angeles plan (established by the court) involves the use of a panel of judges who have in the past "attracted" a high percentage of jury waivers. Each side has one "off the record" exception to the assigned judge. Jury fees are not charged if the waiver is prompt. In New York, jury waivers are "encouraged" by giving bench trials a preference.

Some states impose large jury fees to push the parties toward waiving a jury, especially if the case does not involve a large amount. This tends to price the jury trial out of the market. While a desperate situation with little hope of overcoming it by less drastic means may justify temporary resort to such efforts, the right to trial by jury is regarded by many as a part of "the heart of everything," and it ought to be maintained in fact as well as in theory and not at the price of excessive delay.

Methods of coercing jury waivers do not have great appeal to us. We favor measures to streamline the selection of the jury, a study of how to shorten the voir dire without loss of its value,³² and other methods to shorten the trial itself. We also favor attempts, such as the Los Angeles plan, to reduce the possibility of confrontation at the trial with an unwanted judge and to increase the confidence of the parties and their counsel that the result of the bench trial will be similar to that of a jury trial.

31 Id., §§ 84-113.

32 See "Voir Dire," a bibliography available from the American Judicature Society.

(b) The Pre-trial Conference

A few years ago pre-trial conference procedures were adopted widely and hailed by many as the panacea to accomplish the salvation of the administration of justice. It would bring better justice, and speedy justice would follow as sort of a by-product because so many cases would be settled.

But now many lawyers regard full-scale pre-trial of routine motor vehicle cases as a waste of time and money. New Jersey provides an interesting case study. In 1955-1958 many expressions of enthusiasm are found in the writings of Arthur T. Vanderbilt, then Chief Justice of the Supreme Court of New Jersey, and William J. Brennan, then a justice of that court.³³ In 1959 the hypothesis that pre-trial promoted settlements and saved judge time came under critical examination.³⁴ In 1960 a test conducted by the Columbia University Project for Effective Justice in New Jersey, the first state to make pre-trial compulsory, resulted in a modification of the old rule.³⁵ Pre-trials in automobile cases now are optional.

The report of the Columbia project expressed the view that while under some circumstances it would be useful to use pre-trial for settlement purposes, it would make better sense to use it selectively on trial-bound cases.

Universal pre-trial applied in a routine manner can no longer be regarded as the No. 1 cure for court delay.³⁶ It should be used more selectively--sometimes aimed at settlement and little more; sometimes aimed at improving and shortening the trial of the complex cases almost surely destined for trial. Methods of identifying these cases should be sought. Probably the pretrial conference has a favorable effect on settlement ratios--perhaps not as great as some judges who dis-

33 Vanderbilt, Improving the Administration of Justice--Two Decades of Development, 26 U. CINN. L. REV. 155 (1957); Brennan, Pre-trial Procedure in New Jersey--A Demonstration, 28 N.Y. ST. BAR BULL. 442 (1956). See also, A Judge's Handbook of Pre-trial Procedure, 17 F.R.D. 437 (1955) (handbook published by the Pre-Trial Committee of the American Bar Association Section of Judicial Administration, edited by Clarence L. Kincaid, Judge of the Superior Court in and for the County of Los Angeles, California); NIMS, PRE-TRIAL (1950).

34 ZEISEL, KALVEN & BUCHHOLZ, supra note 7, ch. 13.

35 ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION (1964).

36 It was Cure One in the "Ten Cures" pamphlet, but the pamphlet recognized that there are two forms of pre-trial and that neither is a panacea for delay in the courts. It pointed out that pre-trial's beneficial results require hard work and a "proper attitude" on the part of both lawyers and judges.

pose of many cases at pre-trial are inclined to think, because many of those settlements would occur anyhow. The price paid in judge time is not inconsiderable. Nevertheless, we think it is advisable to provide this settlement opportunity in every case. It is, however, not useful to bring unwilling participants into it routinely. If either party objects, the conference should be cancelled. The judge, if he believes the case is one that ought to be pre-tried, can order the proceeding and reap the incidental by-product of a settlement if it occurs. Either party should be able to secure a pre-trial if he so desires.

The committee, feeling that these matters cannot simply sit and wait the light of further research recommends (1) an automatic settlement conference (i.e., no special effort to sharpen issues, settle pleadings, etc.), unless a party objects, in every case; (2) full scale pre-trial, upon request of either party or of the court, with power to nonsuit and hold in default.

(c) Trial by a Jury of Less Than 12

The common law jury was a jury of 12, and it was required to arrive at a unanimous verdict. It is trial by this sort of jury that was preserved by the Federal Constitution and which, unless the parties otherwise agree, must be used in the federal courts. But some state constitutions authorize juries of less than 12.³⁷

The committee believes that a jury smaller than the traditional 12 is likely to constitute a fair cross-section. Having in mind the time saved at voir dire, the reduction in expense and the somewhat shorter time needed in deliberations, it recommends the use, wherever possible, of juries of less than 12, but not less than six, in the trial of automobile cases. In those jurisdictions where juries of less than 12 are not now possible, provision should be made for their use.

(d) Less than Unanimous Verdicts

Some states (there are 22 in our list) allow non-unanimous verdicts and some eight states allow non-unanimous verdicts by agreement of the litigants. Twenty do not.

Verdicts are arrived at more quickly and there is less prospect of a hung jury when a verdict need not be unanimous. We recommend this procedure wherever possible. In those jurisdictions where non-unanimous verdicts are not permitted, provision should be made for them. We think non-unanimous verdicts should not be allowed except where 12 man juries are used and that at least nine votes should be required for a verdict.

(e) Medical Testimony on Video Tape

The frequent unavailability of busy doctors in court at particular

³⁷ 50 C.J.S. Juries § 7.

times and the undesirability of keeping doctors "waiting around to be reached" often results in trial postponements, to the inconvenience of the parties, the other witnesses, the jurors, the lawyers and the court. As a way of easing this and similar problems the Committee recommends, in appropriate cases, greater use of video tape recordings of medical testimony.

(f) Impartial Medical Panels

Essentially, the procedure is that the state (or county or city) medical society sets up a panel of experts in various fields of medicine. When the judge determines that it would be of material aid to a just decision, he refers, after consultation with counsel, the plaintiff to a selected expert for examination and report. The court and the litigants have access to the report. Either party of the court may call the expert as a witness.

The idea that the court should be able to seek the truth "from a source which carries the best guarantee of trustworthiness"³⁸ is by no means new. A Model Expert Testimony Act³⁹ has been in existence since 1937, and the federal courts have Rule 35, which allows the judge to appoint an expert witness under Section 6 of the model act, by order of court or request of any party. The report of the expert is read, subject to all objections as to the admissibility, by the witness at the trial. Both the model act and the federal rule provide that the compensation of the expert shall be paid by the opposing parties in equal proportions and shall be treated as costs. This is not a satisfactory concept of costs and serves as a hinderance to the utilization of impartial experts. Efforts have been made to provide for payment of medical experts from public funds. In this respect the New York Supreme Court, Appellate Division, First Department, was the pioneer. The procedure there has been available since 1952, and there is considerable information available about it.⁴⁰

One cannot be confident whether impartial medical testimony should be viewed primarily as a means of shortening the trial, as a means of improving the tone of the trial and the quality of justice, or as a way of encouraging the settlement of cases. Perhaps this multi-aspect

38 Peck, Impartial Medical Testimony--A Way to Better and Quicker Justice, 22 F.R.D. 21 (1959).

39 9A U.L.A. 536. In 1943 South Dakota adopted the act as a part of the rules of the supreme court, and several states have statutes or court rules on the subject, for example, California, Rhode Island and Wisconsin.

40 ZEISEL, KALVEN & BUCHHOLZ, *supra* note 7, 120-127. See ALSO, IMPARTIAL MEDICAL TESTIMONY--A REPORT BY A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1956). This report is reviewed by and commented by Morgan, 9 VAND. L. REV. 583 (1956), and Zeisel, 8 STAN. L. REV. 730 (1956).

is a reason in itself to view the procedure with favor.

"Cure Six" of the "Ten Cures" pamphlet stated: "Impartial medical testimony has been responsible for many intangible and statistically immeasurable benefits even in cases where it is not used. It has made for a more wholesome and ethical atmosphere for the presentation of medical claims and it has improved the quality of medical testimony. It has constricted the area of dispute over medical facts and so promoted settlement. Since 1952, seventy-two per cent of the 661 New York cases referred to the panel resulted in settlement before trial. Only eleven per cent reached a verdict or judgment."

The House of Delegates in 1957, on recommendation of the Section of Judicial Administration, adopted a national program "of fostering the creation and employment of panels of impartial medical experts, under court aegis, in the pre-trial consideration and trial of personal injury cases."⁴¹

While these optimistic early reports may need tempering,⁴² there does seem to be convincing evidence that this procedure is of value, that it ought to be used more frequently in jurisdictions where it is available and that provision for its use should be made in jurisdictions where it is not available.

(3) Remanding Cases to Courts with Lower Jurisdictional Amounts

In some states it is common practice to start suit in the court of general jurisdiction, even when the reasonable value of the case is well within the jurisdictional limit of a lower and usually less crowded court. Legislatures have power to provide for the transfer of cases from one court to another, but a court lacks power to transfer in the absence of some statutory authority. Issues of fact may be transmitted to another court for trial, but not issues of law.

An example of a transfer act is found in Massachusetts.⁴³ The statute has been in effect since September 1, 1958, and has been amended three times. The superior court may, on its own motion or on the motion of either party, after determination by the court that if the plaintiff prevails there is not reasonable likelihood that recovery will exceed \$2,000, transfer the action to any district court in which it could have been brought. Any party aggrieved by the decision of the district court may, as of right, have the case retransferred for determination by the superior court, but the decision and the damages are prima facie evidence in the superior court.

⁴¹ 82 A.B.A. REP. 184-185 (1957).

⁴² See ZEISEL, KALVEN & BUCHHOLZ, supra note 7, at 123.

⁴³ MASS. ANN. LAWS ch. 231, § 102C.

Recent results under the Massachusetts act are exhibited in the table below:⁴⁴

	TRANSFER ACT CASES					
	District Courts (Other than Boston Municipal Courts)			Boston Municipal Court		
	1963-64	1964-65	1965-66	1963-64	1964-65	1965-66
Transferred from Superior Court	11,367	11,326	10,502	1,575	1,730	1,461
Tried in District Courts	2,966	3,492	3,185	1,006	529	584
Retransferred to Superior Court after trial	1,466	1,542	1,412	259	240	246
All dispositions ¹	10,342	11,424	10,124	2,602	*	*
riding	7,390	7,265	7,614	378	*	*

¹Agreements, trials, dismissals, settlements, etc.

*Data not available

Many lawyers believe that a given case is worth more if brought in a higher court than a lower court. Therefore, it is necessary to apply some sort of persuasion to induce a decision to file in the lower court. One device is to deny recovery of court costs to the plaintiff who recovers an amount less than the jurisdictional amount of the available lower court. Probably a more feasible way of "deflecting"⁴⁵ cases is the Massachusetts method. Some courts in states not having a transfer act have ways of discouraging the bringing of suits that should be started in other courts. One technique is to give all other cases a "general preference," that is, an equal chance of trial. Cases not on the general preference list are unlikely to be reached.

We recommend that judges should be given statutory power and should exercise it freely to order appropriate cases transferred to the court in which they should have been started. When transfers occur the jurisdictional limit of the lower court should be increased automatically to cover whatever verdict is rendered.

⁴⁴ 1966 ANNUAL SURVEY OF MASSACHUSETTS LAW 380.

⁴⁵ Rosenberg, *supra* note 3, at 42. Cure Five of the "Ten Cures" pamphlet took the position that "congestion could be considerably reduced if cases that will recover smaller amounts were transferred to or brought in the lower courts."

(4) Increasing the proportion of prompt settlements of claims and suits.

This portion of our report deals with settlement of claims prior to suit and also with the settlement of suits. While it is the latter aspect that relates directly to delay in the courts, it is well to bear in mind that any important change in the rate of voluntary settlements prior to suit would have an almost immediate effect on court congestion.

(a) Examination of Criticism that Prompt Settlements are Unusual

Critics assert that the whole system is cumbersome and slow, that prompt payments are extraordinary indeed, that an injured person needing money to pay his bills cannot wait through the long period of delay and may be forced to settle for an inadequate amount.⁴⁶ We shall examine this criticism and make some recommendations.

Auto Accidents, Costs and Payments states (pages 221 and 222) that as to serious injury cases, 31 per cent were settled within six months of the accident and 50 per cent within less than a year. Rosenberg and Sovern⁴⁷ estimate that each year in New York City, where it is generally supposed that delay is serious, 193,000 claimants seek damages attributed to someone's negligence, and of these, 162,000 (84 per cent) recover something. Seventy-one per cent of these claims are closed within one year of the accident. One sample shows 64 per cent closed within six months. Another sample shows 61 per cent closed within six months. As to New York City suits, as of June, 1957, 44.2 per cent were no more than six months old and 67.6 per cent were no more than one year old. Of the 193,000, 39,000 settled or abandoned without consulting counsel; 77,000 settled or abandoned after consulting counsel, but before suit; and 77,000 sued. Of these, only 7,000 reached trial and 2,500 got to verdict.

We were furnished with a pamphlet, "Fact vs. Fiction," published by the National Association of Independent Insurers, which states that 68 per cent of claims are paid within three months, 81 per cent within six months, 86 per cent within nine months and 89 per cent within a year of the accident. The stated source is "statistics compiled by one of our large member companies." A study by the Texas Insurance Department, also referred to, shows 63.3 per cent paid within three months, 77.5 per cent within six months, 83.8 per cent within nine

46 KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM--A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 1, 2 (1965).

47 Delay and the Dynamics of Personal Injury Litigation, 59 COLUM. L. REV. 1115 (1959), reprinted in DOLLARS, DELAY, AND THE AUTOMOBILE VICTIM 79 (1968).

months and 89.4 per cent within twelve months.

A statement furnished by the New York State Association of Trial Lawyers points out that in many cases the nature of the injury precludes early settlement. This statement takes issue with the notion that the injured person and his family are intolerably burdened with expense between the date of the accident and date of disposition. It asserts that 82 per cent of the population has hospital expense insurance, 75 per cent both medical and hospital. As to people under 65, the corresponding percentages are given as 85 per cent and 79 per cent. It is also pointed out that automobile medical payments insurance is widespread, that public programs (medicare, medicaid, public assistance) provide further protection, that some of those injured in automobile accidents receive workmen's compensation benefits, that every resident of New York is entitled to hospital treatment without regard to ability to pay, that 70 per cent of the population has loss of income protection, that four states provide income protection for non-occupational disabilities, and that there are also disability payments under the Social Security Act. Thus, it is concluded that there is no factual foundation for the assertion about intolerable expense burdens between accident date and disposition date.

It should be kept in mind that the availability of benefits under these other reparations systems is "growing fast enough to make your head swim."⁴⁸ If the statistics in support of the "intolerable burden" theory are a few years old, they are out of date. Consider the following excerpt from the May, 1968, report of the Social Security Department of U.A.W.:

MAJOR BENEFIT PROGRAMS

"During 1967, the negotiated programs with which this Department is directly concerned represented approximately \$1.3 billion in annual benefit payments and expenditures for future benefits in behalf of UAW members:

- \$370 million in company paid health insurance premiums
- \$300 million in pension benefits
- \$300 million to fund future pension benefits
- \$100 million in Sickness and Accident (S&A) benefits
- \$ 85 million in life insurance and accidental death and dismemberment (AD&D) payments
- \$ 60 million in payments to workers under Supplemental Unemployment (SUB) programs
- \$ 30 million added to funds reserved for future SUB benefits
- \$ 15 million in income benefits for survivors of workers

⁴⁸ Conard, Live and Let Live: Justice in Injury Reparation, 52 JUDICATURE 105 (1968).

New union contracts negotiated in the fall and winter of 1967 and early in 1968 resulted in substantial improvements in current benefits and in new protection for workers and their families. They reflect the UAW's major interest in improving the health care of its members; in assuring continuing income in the event of their unemployment or disability; in enabling them to retire in decency and dignity; in protecting their family in the event of their death, and numerous related matters."

It is difficult to know what would be regarded as a satisfactory time lag between accident and settlement. Any sort of reparations system will present its own set of delays, and these will be a favorite subject of the critics of that system.

There is a large body of literature critical of workmen's compensation, including the delays that have developed in that system.⁴⁹ This literature would give pause to anyone advocating drastic new plans, if for no other reason than its demonstration of how unpredictably such things develop.⁵⁰

Whatever criteria a given system contains must be satisfied before payments begin. Some investigation must be made. The mechanics of check issuance must be set in motion. Some delay is unavoidable and, if it is, should not be criticized.

But we do not wish to claim too much. In some cases, settlements are unjustifiably delayed, sometimes causing downright hardship and often causing exasperation and the retention of lawyer to start suit, even when liability is not denied and the only problem is to agree upon a proper settlement amount. Probably not all of the blame rests on claims adjusters, but they have the initiative. Much can be done and, we are advised, is being done to remove or at least reduce the criticism arising from this sort of delay.

(b) Use of "Advance Payment" Plans

Many insurance companies are now using the "advance payment" plan of settling cases. Usually the method is reserved for cases in which liability is clear or which are clearly destined to be settled. But a few insurers are finding it useful not to be too strict in drawing the lines. Within a short time of the accident, the adjuster offers, without demanding a release, payment on account of medical and hospital expense, nursing care or for other pressing needs, including, in ap-

⁴⁹ CHIET & GORDON (eds.), OCCUPATIONAL DISABILITY AND PUBLIC POLICY 65, 309 (1963).

⁵⁰ For more on "predicability," see Marryott, 33 INS. COUNSEL J. 435 (1966).

propriate cases, income maintenance. The only strings attached are that the payment does not constitute an admission of liability, does not stop the running of the statute of limitations and is to be credited upon any ultimate settlement or judgment.⁵¹

The technique is too new to have its results show up in the empirical studies, and we know of no authoritative survey that would indicate what impact it will have on court delay or on settlement delay. Judging from the frequency with which it is being discussed in gatherings of claims men and the general tone of the discussions, it is now widely used and its use is continuing to expand.⁵²

We have previously called attention to the relationship of settlement delays with delay in court. We also direct attention to the relationship of settlement delay with various other recommendations which we shall state later.

Our conclusion is that the criticism that prompt payments are extraordinary and that people are so burdened by economic need that they are pressured into inadequate settlements is an exaggeration. But this does not lead us to drop the search for ways to promote early settlements. No sensible insurance company would delay the settlement of a case simply for the sake of delay, and insurers frequently assert their firm desire to settle legitimate claims as promptly as possible. On the other hand, it is not uncommon for plaintiffs' lawyers to assert that they fervently desire to make prompt settlements and that only the dilatory tactics or intransigence of the insurance company prevents this. We do not challenge the sincerity of either of these attitudes. But we do think that too many cases are not settled until the "court-house steps" are climbed.

What we seem to need are some devices that would nudge the parties along somewhat more rapidly and would impose some detriment upon those whose positions, as to the value of the case, are too extreme.

(c) Interest

One of the measures often urged as an effective means of inducing defendants to settle quickly, the awarding of interest from time of injury or time of writ, has been debunked by Zeisel, Kalven and Buchholz, who demonstrate that interest becomes just another item for

⁵¹ Annots., 20 A.L.R. 2d 292 (evidence of payment), 11 A.L.R. 3d 1115 (right to credit), 25 A.L.R. 3d 1091 (effect of advance payment).

⁵² See Des Champs, Advance Payment Techniques, FOR THE DEFENSE, October, 1966 (newsletter of the Defense Research Institute). See also, the Defense Research Institute monograph, Advance Payments--Credit for Payments in Advance of Settlement or Trial.

haggling.⁵³

(d) Court Costs

It should be kept in mind that the plaintiff recovers court costs if he prevails, even if his recovery is less than his demand, less than the offer, and even if only the fact that the demand was excessive has forced the case to trial. This has forced the defendant to undergo large expense, to which the plaintiff's "costs" are added.

(e) The California Offer of Judgment

A device that seeks to bring things into better balance is Section 997 of the California Code of Civil Procedure. It provides that the defendant may at any time before trial or judgment serve upon the plaintiff an offer to allow judgment to be taken against him for a stated amount. If the plaintiff accepts the offer and gives notice thereof within five days, he may file the offer with proof of notice of acceptance, and the clerk must enter judgment accordingly. If the notice of acceptance is not given, the offer is deemed withdrawn and cannot be given in evidence. If the plaintiff fails to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer. Judgments entered under this procedure are deemed to be compromise settlements.

Professor Conard believes that "The speeding up of settlements (not merely trials) would do more to relieve the distress of injury victims than any other change in tort law administration."⁵⁴ His suggestion for promoting early settlements is an adaptation of the British system of putting the costs of litigation, including lawyers' fees, on the losing party. A plaintiff would be authorized to file in court a written demand for the settlement he would accept. If it is not paid within 30 days and his eventual award is higher than the offer, the award would be augmented by litigation costs, including attorneys' fees for services incurred after the demand was filed. The judge would be given discretion to refuse to award costs in unusual circumstances. A defendant also might file an offer of settlement. If it is not accepted and the award is lower, the defendant's expenses after the date of the offer would be deducted from the award.

(f) Making Total Victory Less Likely

Another approach to inducing easier settlements is to make total victory by either side less likely. A change to the comparative negli-

⁵³ ZEISEL, KALVEN & BUCHHOLZ, supra note 7, at 128.

⁵⁴ Conard, The Economic Treatment of Automobile Injuries, 63 MICH. L. REV. 279 (1964), reprinted in DOLLARS, DELAY, AND THE AUTOMOBILE VICTIM 413 (1968).

gence doctrine should work in this direction. We have so recommended.

(g) Removal of uncertainty

Sometimes settlements are delayed because of uncertainty of what limits of liability insurance are available. Allowing discovery of policy limits, but not their introduction in evidence, should help. We recommend that they be discoverable.

Probably there are instances in which the presence of liability insurance is in doubt. Our recommendation as to universal financial responsibility should remove this as a source of delay.

(h) Settlements without prejudice.

In some jurisdictions the settlement or other disposition of a property damage liability claim is usually delayed until the bodily injury claims arising from the same accident are ready for disposition. The defendant fears that disposing of the property damage claim will be prejudicial to his assertion of non-liability on the bodily injury claim. Where removing these fears will have a beneficial effect on the speed with which property damage claims are handled, we advocate the enactment of a statute making the fears groundless.

The Connecticut proposal (item 6 of the Cotter Plan) combines this idea with a provision assuring that "advance payments" for both bodily injury and property damage claims will be non-prejudicial. In Massachusetts a statute undertakes to make clear that neither advance payments nor settlement of a particular claim shall be construed as an admission of liability with respect to other claims arising from the same event.

We do not know of empirical evidence as to the efficiency of any of these devices, but we believe that the California and Massachusetts ideas should be more widely tried. We so recommend.

We recommend continued efforts to make prompt disposition of claims by settlement. We also recommend consideration of the devices suggested above and their adoption where, in the judgment of the local bar, they hold out good prospect of success. We also recommend continued efforts to make periodic payments to or for claimants pending settlement agreement or judgment.

D. SHOULD JURY TRIALS BE ABOLISHED IN AUTOMOBILE NEGLIGENCE CASES?

Since trial by jury takes longer than a bench trial, any study of court delay must consider whether the abolition of trial by jury in automobile accident cases would save enough time so that in places where excessive delay exists the existing number of judges and courts could dispose of backlogs and try new cases within a reasonable time.

(1) Committee opposes abolition of right of trial by jury

This Committee is united in its belief that the jury system should not be abolished and in its belief that the American Bar Association is not likely to reverse its 1958 position that the right of trial by jury should not be abolished in motor vehicle cases.^{54a} The findings of the massive study of the jury system conducted at the University of Chicago Law School are generally favorable to the jury and should give pause to those who may have been inclined to do away with it. It is of some importance, however, to consider the extent of time that might be saved if such a drastic change should occur and to consider alternative methods of saving time.

For the moment we put to one side the obviously great mechanical and time difficulties in changing constitutional guarantees, and likewise lay aside the probable political impossibility of success of a frontal attack upon what has been called the "palladium of our civil rights," the right of trial by jury.⁵⁵ In doing so we are aware that the jury trial has virtually disappeared in civil cases in England, and that persons whose opinions command respect have viewed jury trials as the root cause of delay.⁵⁶ We do not wish to interpose any obstacles to evolutionary changes in the elaborate style of jury trials, in the traditional size of juries, in the usual requirement for unanimous verdicts, in the voir dire, or in the way jurors are selected. We make no attempt here to re-examine, as a question of policy, whether the jury system ought to be abolished.

We share the view of Judge Curtis Bok that, as a practical matter, the jury system in the United States, cannot be abolished by any sort of frontal attack.⁵⁷

(2) How Much Time Could Be Saved?

As noted earlier, a bench trial is believed to be, on the average, 40 per cent shorter. But this does not translate into a conclusion that in a particular court abolishing the jury for automobile negligence cases will result in a saving of 40 per cent of the time now spent in trying cases. To compute the potential time to be saved, we must first know what part of the calendar consists of automobile tort cases.

A computation in Chapter 7 of Delay in the Court assumed that

54a Proceedings of House of Delegates at p. 171 and p. 434.

55 Meltzer, A Projected Study of the Jury as a Working Institution, 287 ANNALS 97 (1953).

56 Peck, Jury Trial on Trial--A Symposium, 28 N.Y. ST. BAR BULL. 322, 339 (1956): "...the inherent slowness of the process of jury trial is the root of delay wherever delay exists."

57 Bok, The Jury System in America, 287 ANNALS 92 (1953).

jury trials would be abolished for all personal injury cases. The court being studied used 13.3 of its judges for trials of law cases. Of the 13.3 judges, 4.1 handled jury trials of personal injury cases. Thus, the 40 per cent was applied against the 4.1, and this results in an estimate of an annual saving of 1.6 judge years. In other words, adding 1.6 judges to a 13.3-judge court would offset the time to be saved from abolishing the jury for personal injury cases.

If the change were prospective, the time to eliminate the backlog was calculated to be seven years. If the change were retroactive, it would take five years. These figures assume no effect, favorable or unfavorable, on settlements from the shift to non-jury trials.

The system being studied spent 30 per cent of its time on personal injury jury trials.⁵⁸ If the time being spent on these trials is a larger percentage, the saving in judge years from the change to non-jury trials would be larger.

The magnitude of the potential savings from abolition of jury trials does not seem to be greater than that obtainable from less drastic, more attainable and less harmful changes referred to in various other parts of this report.⁵⁹

(3) The Special Contributions of the Jury to the Viability of the Automobile Accident Reparations System.

While this part of the report is concerned with delay rather than with the values that have given the right of trial by jury an almost unassailable status, the jury has made and is making special contributions to the viability of the present auto accident reparations system.

Any accident reparation system should contain within itself some means of responding to changing needs, some way of automatically adapting itself to new conditions, and some ability not to commit absurdities by inflexible adherence to rules that do not invariably make good

58 Chief Justice Tauro of the Superior Court of Massachusetts has estimated (letter of August 29, 1967) that in Suffolk County, Massachusetts, 13 per cent of the days spent in trials by superior court judges is devoted to automobile tort suits. The state-wide estimate was 20 to 25 per cent.

59 Waybright, *An Experiment in Justice Without Delay*, 53 JUDICATURE 334 (1969): "Elimination of juries is unnecessary. The basic technique is simple: a judge must. . . apply the philosophy that every case assigned to him becomes his personal responsibility. . . . It is his duty to push the case to conclusion. . . . the trial judge. . . must of course work whatever hours such a system demands. . . ."

sense when applied to particular cases. The prime source of these characteristics of our present system is the jury. We know of no substitute that will do the job as well. The absence of such a substitute is one reason for viewing some of the recent proposals with skepticism. Schedules of benefits are, by contrast with jury verdicts, which individualize damage awards, but crude attempts to provide compensatory damages. Even if legislatures could be depended on to keep them up to date, (there is a persistent lag in keeping workmens compensation benefits in tune with inflation) schedules of benefits must be articulated by the drafter of the statute. But a verdict is a response to the felt needs of the times and the case. In comparison, legislation, even at its best, is a slow and clumsy substitute.

If the jury goes so does much of the adaptability, flexibility and responsiveness of our present system. Even a substantial reduction in delay would be a poor exchange for the loss of these values. We do not believe that the jury trial of automobile negligence cases should be abolished. We do not believe that its use should be interfered with seriously by the imposition of procedural obstacles or unreasonably high costs.

"A noble person on the bench, earnest and able lawyers at the tables, and conscientious jurors in the box can be counted to produce a quality of justice quite splendid enough for most human needs.⁶⁰ Note well the ingredients. We have spoken earlier about the ways to assure a noble person on the bench. We shall have something to say later about earnest and able lawyers. As to how to secure conscientious jurors in the box without undue time and expense, there is some up-to-date information.⁶¹

(4) Selection of Jury Panels

Union County, New Jersey, has a population of more than 500,000, and the process of drawing 9,000 petit jurors and 300 grand jurors a year has required one and a half days of judge time for each of three sessions (four and one-half days). Clerical work has required two months of a clerk's time, plus the time of two jury commissioners, a jury commission clerk, a county clerk, a court clerk, two secretaries and court attendants. A computer-based program now performs the selection process in one hour. The selection process was absolutely random so that every eligible person had an equal opportunity of being chosen.

E. Is Arbitration A Solution?

In the search for a solution to the problem of delay in the

⁶⁰ Bok, *supra* note 56, at 96.

⁶¹ Wagner, Computers for Jury Selection, 53 JUDICATURE 290 (1969).

courts, the possibility of using substitute judges has been considered. Arbitration is the usual method, but there are others that use masters or auditors. In one sense, these methods are akin to the ultimate remedy of more judges. Several major systems of arbitrating automobile cases are now in use.

(1) The Nationwide Inter-Company Arbitration Agreement

The system of arbitration that has developed under this agreement is concerned with controversies arising among insurance companies and involving subrogation claims with respect to automobile physical damage or damage to plate glass. Four hundred forty-five companies participate. It functions through committees in more than 114 cities in the United States. It is restricted to cases up to \$2,500. In 1965 the committee decided 59,943 cases; in 1966, 75,876; in 1967-8, 86,118. Awards in 1965 totaled \$8,910,998; in 1966, \$10,168,475; in 1967, \$12,346,686. The total amounts claimed for all cases submitted in 1965, \$23,447,153; in 1966, \$28,284,974; in 1967, \$32,381,017.

It is staggering to imagine the consequences of a termination of this agreement. The courts could not accept a new load of 87,000 cases a year. To handle them in regular course would be unthinkable. The tremendous public service that is rendered by those who conceived and operate this agreement without burden to the taxpayers is not less valuable because it is so little known.⁶² It is probably the largest arbitration system in the world.

(2) The Special Arbitration Agreement

This agreement provides a program for arbitration of disputes among insurance companies, each of which has issued a policy covering one or more of a number of parties each alleged to be legally liable for an accident from which a bodily injury or property damage claim or suit arises. It is not limited to automobile cases. The committees now have statewide jurisdiction. It is compulsory as to signatories in situations in which the case has been settled for not over \$10,000. The aim is to solve the question of what proportionate share should be borne by the respective insurers. It may be used by mutual consent when larger amounts are involved.

(3) Uninsured Motorist Coverage

This coverage, introduced in 1956 (and now sold in at least 45 states) agrees to pay damages the insured is entitled to recover because of bodily injuries sustained by reason of the negligence of the

⁶² Demer, Inter-Company Arbitration Revisited, 52 JUDICATURE 111 (1968).

owner or operator of an uninsured automobile.⁶³ The usual form of endorsement (or policy provision) provides in cases not settled by agreement for arbitration of both liability and damages. The arbitration provision is legally enforceable only in the 23 or so states having statutes which permit agreements to arbitrate disputes arising in the future.

The American Arbitration Association has established procedures for the arbitration of these cases and to mid-1967 had administered approximately 40,000 cases. In 1966, 60 per cent of cases on which American Arbitration Association procedure had been called for were settled before the award. About 93 per cent of all claims under the uninsured motorist coverage are settled by agreement without a demand for arbitration being made. The percentage (3 per cent) of "hard core" cases that resist settlement is about the same when arbitration is the method of resolution as when trial is the ultimate resort.

Several insurance companies, including one of the largest, do not use the American Arbitration Association facility in most states for uninsured motorist claims but do provide for arbitration. The person making claim or the company, upon demand of the other, selects an arbitrator. The two so named select the third.

Under American Arbitration Association procedure 80 per cent of the arbitrations are finished within 12 months of demand. Usually it takes about five months (of the 12) for the arbitrator to be named. Most attorneys do not desire a more prompt appointment. The party initiating the arbitration pays a fee of \$50.00. The insurance company pays the balance of the cost of \$150.00. The filing fee of \$50 is awardable as costs in any manner the arbitrator deems appropriate, against the insurance company in 74 per cent of the cases. Ninety per cent of the cases require not more than one day of hearing.

In most states the average cost of an uninsured motorist bodily injury case is higher than the average cost of a bodily injury case arising against an insured defendant.⁶⁴

⁶³ See Aksen, Arbitration of Automobile Accident Cases, 42 CONN. B.J. (1968).

⁶⁴ According to statistics furnished by the Mutual Insurance Rating Bureau, this was true in 38 of the 39 states reported on for the combined accident years of 1963-1965. According to the Insurance Rating Board, the same was true in 16 of 18 states reported on for 1965 cases. NAII statistics show that for 1965 the average uninsured motorist loss was higher than the average bodily injury loss (single-car risks, multiple-car risks and assigned risks combined) in 39 of the 49 states reported on.

4. New York City Accident Claims Tribunal

As early as 1928 the American Arbitration Association had made a study of the possibility of using arbitration to stem "this mounting tide" of disputes in automobile cases. Acting with the active support and cooperation of the National Bureau of Casualty and Surety Underwriters and a committee of distinguished lawyers, an Accident Claims Tribunal was established in New York City in 1933. Any party desiring arbitration so stated to the tribunal and paid a \$2.00 filing fee. The tribunal then sought to bring about the consent of the other party. When the hearing was set, the defending party paid \$5.00. Frances Kellor states that up to 1941 a total of 10,500 cases were referred. What success occurred in securing the consent of the other party is not stated. She does say that 46 insurance companies submitted cases.⁶⁵ Information from a private source is that less than ten cases were arbitrated between 1937 and 1940.

In spite of efforts to make this a more popular program, it has languished, and earnest efforts to develop somewhat similar programs in other cities (notably Los Angeles and Cleveland) have not been marked by any great success.

5. The "Philadelphia Story" or "Trial by Lawyer"

In 1957 the Pennsylvania Legislature by statute enabled the Municipal Court of Philadelphia (now the County Court of Philadelphia) by rule to require the arbitration of civil cases (other than those involving title to real estate, etc.) in which the amount of controversy is \$2,000 or less.⁶⁶ Under the 1968 amendment the amount is now \$3,000.

The Philadelphia Bar Association moved swiftly, spurred by fear of complete breakdown because of the huge backlog of cases, to cooperate. By the end of 1967, the plan had received 66,025 cases, 40,541 of which had been disposed of by reports and awards.⁶⁷

The plan won the 1958 Award of Merit of the American Bar Association, and most of the comment has been laudatory rather than analytical. In 1966 Attorney General Schnader said, "I can't imagine what the situa-

⁶⁵ KELLOR, ARBITRATION IN ACTION (1941).

⁶⁶ Voluntary arbitration had been possible in Pennsylvania since 1836. In Philadelphia compulsory arbitration came into existence on February 17, 1958, under an amendment to the 1836 act. See Rosenberg & Schubert, Trial by Lawyer, Compulsory Arbitration of Small Claims in Pennsylvania, 74 HARV. L. REV. 448 (1961).

⁶⁷ Zal, Report of the Arbitration Commissioner, LEGAL INTELLIGENCER (Philadelphia), January 2, 1968.

tion of the Philadelphia courts would be if it were not for the operation of the Compulsory Arbitration Division. . ."

Arbitration is by panel of three lawyers. 2,500 members of the Philadelphia Bar have expressed a willingness to serve on these panels. The three-man panel now is paid \$70.00; \$30.00 to the chairman and \$20.00 to each of the other members. Usually the hearing is arranged at the office of the chairman. Time lapse between the filing of the trial order and assignment to a panel is usually about four and a half months. Disposition by the panel usually occurs 30 to 60 days after assignment, but in 1967 about 12 per cent of the cases were not disposed of within 90 days of the assignment. An appeal de novo (involving a jury trial) is allowed (upon payment of the cost of the arbitration), and this saved the statute from being held unconstitutional under the Pennsylvania constitutional provision that "Trial by jury shall be as heretofore, and the right thereof remain inviolate."⁶⁸

Similar plans may be used in other Pennsylvania counties (and are actually in use in 21), but much of the readily available information relates to Philadelphia, largely because of the custom of the late Frank Zal, Commissioner of the Division of Compulsory Arbitration of the County Court of Philadelphia County, of providing detailed annual reports on the plan.⁶⁹

Awards to claimants are more numerous than those to defendants. In 1966, just under 68 per cent were in favor of the plaintiff; in 1965 about 74 per cent. The largest number of awards (422) in 1966 fell within the \$201-\$300 bracket.

A certain Philadelphia lawyer is known to have remarked, "Around here being against compulsory arbitration is like opposing the Fourth of July, motherhood and the pre-trial conference." But the backlog became too large again and in 1968 the scope of the plan was increased to include cases up to \$3,000, even though 87 per cent of all the awards have not exceeded \$1,000.

As usual, there are the proverbial flies. There has been some published criticism that the panel members don't really judge the cases but work out compromise settlements by haranguing among themselves.⁷⁰ "Plaintiffs' lawyers" are said to outnumber "defendants' lawyers" on the lists from which the panels are selected by 30 to 1. It is said that some panel members are inexperienced, know little about negligence cases and that this makes for a degree of unpredictability.

⁶⁸ Application of Smith, 381 Pa. 223, 112 A. 2d 625 (1955).

⁶⁹ Zal, Philadelphia's Municipal Court Eliminates Backlogs, 47 A.B.A.J. 1101 (1961).

⁷⁰ Nissenbaum, Judge and Be Judged, 24 THE SHINGLE 107 (1961).

There are other caveats.⁷¹

Does it really make sense to have to pay \$70.00, the cost of the arbitration, to start an appeal from an award in small cases? Does this fee repayment device for practical purposes amount to a denial of a jury trial in small cases, especially since the amount is not recoverable as costs even if the appealing party prevails?

The question of fairness remains. The arbitrators are more prone to find for the plaintiff. Almost one third of the litigants come out differently than they would before a jury. The jury, in appealed cases, disagrees with the arbitrators in 39 per cent of the tort cases. Does it not probably encourage more claims? Since it works out that it takes eight participants by attorneys (arbitrators) to spare the court of a full trial, is enough saved?

6. General Conclusion

Even under the best of circumstances arbitration essentially is a way of performing the functions of the courts through arbitrators instead of judges and juries. Its essential value and perhaps its essential weakness is that it makes use of volunteer "judicial" manpower. We doubt the wisdom of trying to construct a large or permanent system so dependent on perhaps inexperienced and unsuitable volunteer or nominally paid "judges" and on the attraction of stated costs that do not reflect the full value of the contributions of these volunteers. It would be better to depend in the main on an adequate number of well-trained, permanent, professional judges.

It is unlikely that a plan that seems to have been a popular, if not unqualified, success in a congested court of a relatively low jurisdictional amount (\$5,000) will bear transplanting to a court of higher jurisdiction where the proportion of "heavy" cases is large and where the amounts involved would clearly justify the cost of securing a jury trial by way of an appeal from an adverse decision of the arbitrators. While the public spirit and zeal of the 2,500 Philadelphia panel members is to be highly commended, can it be expected or even desired that "heavy", difficult cases will be satisfactorily disposed of under the "trial by lawyer" approach? Especially if there is no device to keep the very young, the very biased or the non-tort lawyers off the lists?

Arbitration has been applied successfully in the automobile tort field when there is either (1) outright compulsion, (2) strong pressure to arbitrate, or (3) the parties occupy a special relationship to each other essentially different from that of plaintiff and defendant in an automobile case. There may be valuable continuing business relation-

⁷¹ Rosenberg & Schublin, supra note 65.

ships that are less disrupted by arbitration than by trial; there may be a feeling, equally shared by both parties, that delay cannot do either side any good; there may be a high degree of confidence that the arbitrators will be perceptive and will understand and appreciate better than a court will the position of the respective parties; there may be an absence of suspicion of bias or lack of skill.

Even if the Committee wished (which it does not), as a matter of general principle, to recommend general compulsory arbitration for all, or possibly for a substantial block of automobile claims, it would be deterred from doing so by the realization that there are still many states in which agreements to arbitrate future disputes are unenforceable, and there still are constitutional problems in states guaranteeing jury trials.

It is, however, the belief of the Committee that as a result of continuing efforts and under certain sets of circumstances that cannot be precisely stated in advance a formula for successful voluntary arbitration of certain types of automobile tort claims (for example, property damage claims) may evolve. We recommend to state and local bar associations, to other lawyer groups, to insurance companies and associations of insurance companies and to the American Arbitration Association that efforts to bring about a fair and workable plan for the voluntary arbitration of appropriate categories of small tort claims arising from automobile accidents be continued.⁷² These efforts are more urgently needed in areas where the courts are grossly overburdened and where efforts to increase the capacity of the courts are not likely to be successful in time to relieve undue delay.

The plan would not replace trial by court and jury. Rather it should be designed as a supplement, primarily to deal with small cases of a routine nature that should not require the full-scale use of the established judiciary and its usually rather elaborate facilities.

The question "Is arbitration a solution?" has answered itself. In the field of inter-insurance company controversies involving subrogation claims involving physical damage coverages, arbitration is a solution. As to cases within the scope of the special arbitration agreement, arbitration is a solution. As to uninsured motorist coverage, arbitration has provided a solution.

⁷² The April 4, 1969, issue of Arbitration News, published by the American Arbitration Association, describes an experiment being conducted in Erie County, New York. It is a voluntary plan, and it has an unusual feature by which the parties may stipulate that the award shall fall between maximum and minimum figures. If the award is for less than the minimum, the minimum becomes the award. If it is more than the maximum, the maximum becomes the award.

The common denominator is that the parties in interest occupy a relationship to each other that is essentially different from that of plaintiff to defendant in an automobile tort case. Success in these areas does not necessarily forecast success for arbitration in the normal plaintiff vs. defendant situation. In these situations we believe that the courts should not abdicate their usual role. The emphasis should be on efforts to improve the stature of the courts, to improve their ability to do their work on time, to make certain that litigants have easy access to the courts for the resolution of their controversies by professional judges, and to preserve the right of trial by jury, in fact and in theory.

F. TRAINING AND PERFORMANCE OF JUDGES AND LAWYERS

(1) Training of Judges

Sometimes judges without adequate experience mount the general trial bench. The duties of a trial judge are exceedingly difficult and complex. Programs of judicial education, such as those offered by the National College of State Trial Judges, have proved their worth and should be intensified and expanded. In-service training programs through judicial institutes should be continued. Effective judicial performance requires continuing in-service training. Arrangements should be made to enable judges, particularly new judges, at public expense, to participate in training programs.⁷³

(2) Training for Advocacy.

Greater emphasis should be placed on training for advocacy both in the law schools and in continuing legal education. One of the reasons for delay in the trial of automobile accident cases is the inadequate training and experience of some lawyers who handle the cases. Sometimes cases are brought to trial that should have been settled had the lawyers handling them been more expert or realistic. Sometimes trials are prolonged because of the failure of inexperienced lawyers to understand their cases or to know how to present them.⁷⁴ Nevertheless the emphasis in legal education is away from trial advocacy and toward other aspects of the law, and many law schools do not provide intensive training in the fundamentals of trial techniques.

An eloquent and comprehensive statement of the case for training for advocacy is found in the "Annual Report to the Members of the Bar,"

⁷³ Klein, In-Service Judicial Training, in 1967 ANNUAL SURVEY OF AMERICAN LAW 682; Gutman, An Experiment in Judicial Education. 52 JUDICATURE 366 (1969).

⁷⁴ Lumbard, Can We Save the Trial Bar? 45 J. AMER. JUD. SOC'Y 12 (1961); Tauro, Law School Curricula Must Change To Give Bar More Trial Lawyers, TRIAL, October/November

by G. Joseph Tauro, Chief Justice of the Massachusetts Superior Court:

"...in spite of the general improvement of the entire bar, one of the major chronic obstacles to efficient judicial administration is the shortage of skilled trial lawyers. . . there is an insufficient number of capable trial lawyers to process with efficiency and justice the civil and criminal caseloads of our courts of general jurisdiction. . .What disturbs me. . .is the failure of the legal profession to come to grips with this situation. . .I am able to perceive the stirrings of interest."⁷⁵

Justice Tauro describes some recent action. For example: The panel discussion of trial advocacy during the 1967 meeting of the National Conference of Metropolitan Trial Judges and the passage of a resolution supporting the development of programs for training in advocacy; the action of the Judicial Conference of Massachusetts and of the National Conference of State Trial Judges; the American College of Trial Lawyers and the American Trial Lawyers Association support for this resolution; the 1968 panel discussion at the Conference of Metropolitan Trial Lawyers and the formation by the conference of a committee on trial advocacy; the indication of interest by the Committee on Advocacy of the A.B.A.

Justice Tauro expresses the view that the initiative rests with the law schools. He notes that while programs of continuing legal education may bring about qualitative improvements, they are not likely to increase the number of trial lawyers. A graduate-level program is viewed as perhaps beneficial, but a more workable alternative is thought to be a revision of the third-year law school curriculum.

Legal education should be modified so that more training in advocacy can be given in the law schools so that lawyers entering practice will be better qualified for the practice of law in the courts.⁷⁶ If this training cannot be included in the regular curriculum, it should be offered as an extracurricular activity. Programs of postadmission legal education should continue to include lectures and text materials aimed at increasing the knowledge and skills of trial lawyers and materials designed to assist lawyers, who did not have an opportunity while in law school to study the art and the responsibilities of the advocate, to further their education in these respects.

⁷⁵ 53 MASS. L. Q. 316 (1968).

⁷⁶ Lawless, Training the Trial Lawyer, 52 JUDICATURE 374 (1969), is an account of the Notre Dame training program by the dean of that law school. Professor Keeton has advised the Committee that at Harvard civil procedure is a required course and that evidence is an elective taken by about 80 per cent of the third-year class. Trial practice is usually an elective and is taken by 70 per cent of third-year students.

The Committee is aware of the views of those who believe that law schools should not (indeed, cannot) provide training in specific professional skills.⁷⁷ Perhaps, the ultimate outcome of the search for a curriculum that makes optimum use of available time to provide the best and most relevant basic theoretical education is to crowd out apprentice training. If this should occur, the best hope for the future may lie in having continuing legal education provide enough training in specific courtroom skills and at least some training in arriving at a realistic settlement figure to meet the needs of lawyers who handle automobile tort cases.

(3) Performance of Judges

The ultimate remedy for delay in the courts is more judges. Much the same effect can be attained by realizing more work hours from the existing number of judges in the course of the judicial year. The attainment of this result is an objective of court administration.

How much can be expected from longer working hours and shorter vacations for judges? We turn, as did Cure Four of the "Ten Cures" pamphlet, to Chapters 15 and 16 of the Zeisel, Kalven & Buchholz book, Delay in the Courts.

In the New York court being studied there were 196 official trial days per year. But the actual number of "trial activity" days, even if used for nothing more than settling a case that had been set for trial, was 170 a loss of 26 court days per year per judge. This is 13 per cent, and 36 per cent of this loss fell on the last Friday of the term. How much of the loss could be attributed to imperfect scheduling was not determined. In comparison, New Jersey, where court administration was regarded as "tight", the available number of trial days was 190 and the actual days used for trial activity was 184, a loss of only six days.

One obvious solution is a longer court year; i.e., a shorter summer vacation. New York tried this for a few years, but it was unpopular with both the bench and bar. It did, however, cut into the backlog by 13-14 per cent. New Jersey, however, even in the Vanderbilt era, did not regard a short summer recess as essential to an efficient court.

As to hours worked per day, the figure (average) given for New York

⁷⁷ Hazard, Challenges to Legal Education (Research Contributions of the American Bar Association, No. 8, 1968); McKay, Legal Education: It Is Later Than You Think, 52 JUDICATURE 272 (1969). But see, vom Baur, Revitalizing the Trial Bar, 55 A.B.A.J. 138 (1969). In the March 1969, issue of the Boston Bar Journal, page 3, Theodore Chase, President of the Boston Bar Association, comments on Justice Tauro's proposals and outlines the training for advocacy given at Boston College, Boston University and Suffolk Law School.

is 4.1 hours; for New Jersey, 4.5 hours. Combining the days worked and the hours per day, it was concluded that the average New Jersey judge put in 19 per cent more trial time than his New York counterpart.

It is of interest to compare the potential impact on delay of abolishing jury trials and the impact from a seemingly modest step-up in the time spend by judges at trying cases. A dramatic account of the impact of plain hard work is given in "The Crisis in the Courts," in Fortune, December, 1961.⁷⁸ The court involved was the Federal District Court for the Eastern District of New York, where the delay was 43 months. The account relates to the "task force" sent in "to straighten out the Brooklyn mess," headed by Chief Judge William F. Smith. We quote:

"Bill Smith's arrival in Brooklyn must have rivaled, in somewhat lower key, Gary Cooper's walk down Main Street in High Noon. Smith and his first five visiting judges set up a separate court. . . took the oldest cases, while the regular court went ahead with the regular docket. Smith's court began work punctually at 9:30 A.M. and ran until 4:30 P.M., the regular federal court across the street kept its regular hours of 10:30 to 4:00... Heavy-set, blunt Bill Smith was a businesslike judge... He and his fellow judges obviously had worked long hours to know as much about the cases as the lawyers did. At the end of Smith's special two-month term, the record of his court stood at 1,050 old cases processed, 681 settled prior to trial, 325 scheduled for subsequent trial, and forty-four cases dropped. On the average, civil-case delay had been whittled down by five months..."

We do not know how many hours a year a judge should be expected to work. The New York figure is 696; in New Jersey it is 826; in California, 914. This is a matter that needs to be worked out by the administrative judge and some guideline standards developed. The cooperation and assistance of the local bar will be necessary, and in jurisdictions where the pace is recognizably slow, the local bar should, if necessary, initiate speed-up programs.

4. Performance of Lawyers

The semi-official statistics measure delay in terms of time from "at issue" to trial. The injured person, however, measures delay from the time of the accident until the matter is concluded. Some of this delay is caused by the lawyers. When a lawyer is dilatory in filing papers, when he is too busy to attend pre-trial conferences at the scheduled dates, when he finds it necessary to ask other lawyers to extend the professional courtesy of agreeing to continuances, he is contributing to this kind of delay. "In five out of nine cases, selected at random. . .one or both of the attorneys caused an extra year of delay by

78 Fortune, December 1961.

tardiness in filing papers."⁷⁹

Even though some of this delay is not part of the delay from "at issue" to trial, it is of significance since it supplies some members of the general public with reason for regarding the present system with cynical scorn.

Trial lawyers who contribute to the problem are not acting in their own best long-range interests, nor are they living up to their ethical duty to aid the legal system to "function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances."⁸⁰

G. MORE JUDGES--THE ULTIMATE REMEDY

Enormous amounts of energy have been expended in trying to solve the problem of delay in the courts by introducing procedural devices, by seeking methods to dispose of cases through pressures on litigants to settle, and by developing methods to try cases before nonprofessional judges. Sometimes it has seemed that these approaches were being viewed as the preferred ways to proceed. Sometimes it has seemed that the direct approach--adding enough professional judges to deal with the expanding work loads of the courts--was regarded either as hopeless because of legislative reluctance or was being given scant attention.

Granted that one must work with the available tools and that pleas for more judges fall on deaf legislative ears if the courts have not organized themselves as to make nearly maximum use of existing facilities and manpower, or if the bar had shown no great interest in the avoidance of delay, have we not finally arrived at the point where the bar can in many places aggressively assert the need for additional judges in good conscience? This is the ultimate remedy, not lightly to be resorted to but not lightly to be denied either, when thousands of litigants are being kept waiting for unjustifiable lengths of time.⁸¹ The delay is unjustifiable if, after reasonable procedural and organizational improvements have been made, it is fairly attributable to the simple fact of an insufficient number of judges to do the job.

⁷⁹ Quoted from Banks, The Crisis in the Courts, FORTUNE, December, 1961, at 86. The author's source is a University of Pennsylvania Law School Survey conducted by Levin and Wooley.

⁸⁰ Proposed Code of Professional Responsibility, Canon 8, § 1.

⁸¹ There is some indication that legislatures are responding. A comparison of the tables showing the number of judges in the 1967-68 and 1968-69 issues of the Book of the States, shows an increase in the number of judges in 25 states. No conclusions can be drawn from these data as to the relationship between the degree of need and the legislative response.

It is our belief that this is the case in many places. In most parts of the country the business of the courts, not just cases from automobile accidents, has been increasing at a more rapid rate than the number of judges. The resulting congestion and delay, in spite of improvements in procedures, seems inescapable unless more courts are created.

The most certain way to keep up with the expanding need for judicial services is a self-executing constitutional (or statutory) provision that creates a new judicial office and requires it to be filled with each significant change in the ratio between the population and the number of judges. The ratio should vary with the geographical and other characteristics of the state. Each state would devise its own formula, and it should work both ways; i.e., an increase in population would result in more judges; a decrease in population would result in fewer judges. It should work automatically, without regard to which party is in power or other irrelevant circumstances.

We recommend that in places where excessive and unjustifiable delay in the courts now exists, the number of trial judges should be increased and that, whenever the need is clear, appropriate increases in supporting personnel and physical facilities should be provided.⁸²

II. THE GOAL--JUSTICE WITHOUT UNAVOIDABLE DELAY

We believe that the search for speedy justice must not lead us away from the search for justice. "Speedy injustice is a poor substitute for slow justice." The need is for high quality without avoidable delay. Some delay is not only unavoidable, it is necessary to the attainment of the goal. Investigating how the accident happened, treating the injuries sustained and making sure none were overlooked, determining whether there is any permanent disability, determining whether the case can be settled without litigation, preparing for trial--all this takes time. But it is time that should be taken. Delay attributable to these things is unavoidable and is not objectionable. In some parts of the country it is right to speak of court delay in terms of crisis. While the idea of "try anything" is simply too dangerous to be advo-

⁸² The improvement of court facilities has had the attention of the Section of Judicial Administration for many years. The section's Committee on Courtroom Design and Facilities, with the cooperation of a committee of the American Institute of Architects, in 1967 obtained a grant from the Ford Foundation of \$197,000 to the American Bar Association Fund for Public Education to finance a study at the University of Michigan Law School on "Environmental Facilities Criteria for a More Effective Administration of Justice".

The American Judicature Society publishes Courthouses and Courtrooms. See also, Klein, Court Facilities, in 1967 ANNUAL SURVEY OF AMERICAN LAW 697.

cated, we cannot sit and wait for the miracle cure to be invented or for the improvements that finally emerge after slow and patient work at the fundamentals of better selection, education and training of judges.

Not the least of the difficulties confronting those who wish to make constructive proposals for improving the administration of justice is the possibility that in the foreseeable future so many changes will occur in the environment in which the tort law operates that present solutions will become obsolete, perhaps even before they can be implemented.⁸³ One can only hope that the awareness of these ominous prospects will continue to inspire both brilliant thoughts about future reforms and practical plans for continuing research applied to present problems.⁸⁴

But, if the "try anything" route is followed, let us at least be certain that whatever previous experience there may be with the use of a particular expedient is reviewed, that there is a mechanism for producing the detailed statistics necessary for objective evaluation, and that there is a means of retreat if the drug turns out to have too many undesirable side effects.

Both Professor Conard and Professor Keeton seem to argue that reducing court delay is hardly worth doing because partial success will encourage fewer settlements and thus breed more litigation that will continue to overwhelm the courts.⁸⁵ We do not believe that these dismal views can be supported. But we do recognize that means to facilitate and encourage settlements without resort to litigation are a necessary part of an effective solution to the problem of delay. Some of our proposals are aimed directly at doing so and are stated in other sections of the report. Other proposals should have useful effects in facilitating prompt settlements. If nothing less than total success in eliminating avoidable delays of unreasonable length will be necessary, that must be our goal.

⁸³ John R. Bond, publisher of *Road & Track*, in the May, 1969, issue of that publication (page 25) predicts that the "auto as we've known it, is slowly but surely exterminating itself." He says that the ratio of cars to people will decrease and that "personal transportation is gradually going to become too expensive."

⁸⁴ A notable step forward is the establishment of the Federal Judicial Center in 1967 by Public Law 90-219 to conduct research and develop recommendations for the improvement of court administration and management and for the education of judges and court personnel. Retired Justice Tom C. Clark is director of the center.

⁸⁵ Conard, *supra* note 53, at 286; KEETON & O'CONNELL, *supra* note 45, at 15.

2. The Reliability of Fault Determinations

The charge that fault determinations are unreliable is easy to make but not so easy to support. The Committee, all members of which have had the opportunity to observe such matters in day to day operation, believes that fault determinations made by experienced claims men, judges and juries are highly reliable.

One of the assertions in the Keeton-O'Connell book consists of the quotation of a description by Professor Leon Green of the act of driving an automobile.⁸⁶ It does not pretend to be a precise or accurate analysis based on scientific knowledge; it is merely one man's effort to state in colorful language all the things a person must do under the various circumstances that might arise while operating an automobile. Professor Green concludes, and Professors Keeton and O'Connell seem to adopt the conclusion as the cornerstone of their case, that it would be unlikely that the accident facts could be stated accurately and even more unlikely that anyone could apply a rational judgment in allocating responsibility between the parties on the basis of fault.

Professors Keeton and O'Connell also rely on an analysis of the average number of "probable occurrences" while driving a car. This begins with an estimate of the number of "observations" per mile and ends with an estimate of the number of personal injuries (1 per 430,000 miles) and the number of fatal accidents (1 per 16,000,000 miles). But these figures challenge the idea that driving an automobile is a very complicated job.

Professors Blum and Kalven also challenge the thesis that effective recreation of traffic accidents is too difficult. Their point is that these difficulties are "manageable" and not greater than those dealt with in many other phases of our lives.⁸⁷ Professors Keeton and O'Connell' answer is that events preceding an accident are too commonplace to receive close attention from the participants. In support they cite (1) Attorney Lawrence H. Eldredge's description of his personal inability to give a good account of an accident in which he was involved, and (2) a fictional account in The New Yorker of a motorist's confusion in the face of questioning.⁸⁸ The section concludes with the suggestion that automobile accidents are unique in human experience in the "intractability" of their facts.

Professors Keeton and O'Connell are careful to point out that they

⁸⁶ KEETON & O'CONNELL, 16-17.

⁸⁷ Blum & Kalven, Public Law Perspectives on a Private Law Problem--Auto Compensation Plans, 31 U. CHI. L. REV. 641, 647 (1964).

⁸⁸ November 7, 1964, at 204.

are not trying to say that there never are cases in which fault is easily determined. They do say that there are "many more" accidents in which fault is difficult to determine and that very often fault is an unrealistic, expensive and frustrating criterion.

We doubt that these conclusions can be supported. Studies⁸⁹ (reported in the Law Forum, published by the University of Chicago, Fall, 1967, pp. 390-393) and the judgment of the committee indicate that a large proportion of all automobile accidents are uncomplicated events in which the fault determination is very easy and that many of the more complex accidents can be accurately analyzed by people trained to do such work on the basis of the physical facts, even when the impressions of the witnesses are confused. The final positions of the cars, the tire marks and the location and extent of the damage frequently established clearly how the accident happened and who was at fault.

Other points emphasized by Professors Keeton and O'Connell are that witnesses are likely to be (1) unable to remember, (2) too full of pride to admit that they are wrong, (3) deliberate liars, or (4) hopelessly confused. Again there is almost total reliance on personal opinion rather than factual studies. The honest witness who can't tell his story because cross-examination causes him to become hopelessly confused is probably more common in literature than in real life.

Another Keeton-O'Connell point is that the trial of a case is a poor way to determine fault because, among other difficulties, the jury is apt to be confused or misled. It is said that the theatrical tricks of the plaintiff's lawyer, or sympathy or other emotional factors unduly influence the jurors. Lawyers, it is said, are more and more making trials into theatrical productions and are deliberately searching for and using techniques designed to appeal to bias, credulity and gullibility and to "cash in" by exploiting the human weakness of jurors.⁹⁰

Surely here again we need more than mere assertion. Have we gotten to the point when judges generally have lost control of the conduct of the trial? Most judges are skilled at quashing such conduct and some can turn it against the practitioner who has the bad taste and poor judgment to attempt it in their courtrooms. If this situation is out of control, it had better be brought under control regardless of the ultimate form of the injury reparation system.

The Evidence--Opinion and Empirical.

In fact, however, there is a formidable body of expert opinion, well supported and documented, that juries are rarely bewildered or de-

⁸⁹ 1967 U. ILL. L. F. 390.

⁹⁰ KEETON & O'CONNELL 22.

ceived. We accept the Blum and Kalven comment that "It is thus difficult to make any special argument about the failure of the negligence criterion to control the jury."⁹¹

The research reported in the University of Illinois Law Forum (footnote 89) consisted of two parts. First, the file on each of 229 accidents reported to the Andover, Massachusetts, office of an insurance company, beginning March 1, 1967, was examined in numerical sequence. Then the same thing was done with 123 cases in the Natick, Massachusetts, office, beginning with April 1, 1967. The total is 352. In some cases the file consisted of an accident report alone. These were the cases in which the accident was so insignificant, or in which the facts, as originally reported, so clearly indicated who was at fault that no further investigation was needed. In the other cases an investigation had been made.

This is what was found:

In 25 cases the policyholder struck a stationery object other than a parked car.

In 64 cases parked cars were involved. In 24 of these the policyholder backed into the other car. In 21 the policyholder struck the parked car in some way other than backing into it.

In 16 cases another car struck the insured's parked car other than by backing into it.

⁹¹ Blum & Kalven, supra note 87, at 11. In the 1920s a New York City trial judge reported that from October 1, 1924, to June 30, 1925, he disagreed with the jury in only 66 of 1,532 verdicts. McCook, The Jury, 49 NJ.L.J. 102 (1926). In 1949 a New Jersey judge said he agreed with 85 per cent of the jury verdicts in his court in the period from 1937 to 1949, and he concluded that jury verdicts amounted to "realistic justice." Hartshorn, Jury Verdicts: A Study of Their Characteristics and Trends, 35 A.B.A.J. 113 (1949).

The jury project of the University of Chicago Law School reported in a progress report that in cases in which the jury found for the defendant, the judge agreed 82 per cent of the time; in cases decided for the plaintiff, there was complete agreement in only 18 per cent of the cases. But in 69 per cent of these latter cases, the difference was only as to the amount of damages. Kalven, A Report on the Jury Project of the University of Chicago Law School, 24 INS. COUNSEL J. 368 (1957). In a later progress report it was stated that there was agreement between judge and jury as to liability in 83 per cent of the cases. Broeder, The University of Chicago Jury Project, 38 NEB. L. REV. 744 (1959). The original Chicago project report showed agreement in 80 per cent of personal injury cases.

In one case the policyholder said he was struck in the rear by the other car. In the same case the claimant said the policyholder backed into him while he was parked. The case was recorded as "fault questionable."

In 29 other cases backing into a moving car was involved. In 18 of these the policyholder backed into the claimant and was clearly at fault. In nine other cases the other car backed into the policyholder's car and was clearly at fault.

There were 79 "rearenders," other than those included above. In 44 of these the policyholder struck the other car from the rear and was judged to be clearly at fault. In 35 of these the claimant struck the policyholder's car from the rear and was judged to be clearly at fault.

There were 78 intersection cases--22 per cent of the total number. Of these the policyholder was judged clearly at fault in 16 cases, and possibly at fault in 19 cases. The claimant was thought to be clearly at fault in 22 cases and probably at fault in 10 cases; 11 were "questionable."

Only one pedestrian case showed up and the policyholder was judged to be clearly at fault.

Six cases involved cars pulling out of parked positions. The policyholder was judged clearly at fault in four, the claimant in one, and one was "questionable."

There were 14 "sideswipe" cases, i.e., the cars were going in the same direction. The policyholder was held clearly at fault in six, the claimant in five, and three were "questionable."

In 32 cases the cars were going in opposite directions. In 16 of these the policyholder's car crossed the center line and was judged to be clearly at fault. In 12 the claimant crossed the center line and was held to be clearly at fault. Four cases were classed as "questionable."

Twenty-three cases fell into the "miscellaneous" slot. The policyholder was clearly at fault in three, and probably at fault in four. The claimant was held clearly at fault in eight and probably at fault in five. Three were "questionable."

Three cases involved a question of being "under the influence."

One case involved a defect in the vehicle.

No cases were attributable to road defect, other than ice and snow.

No cases involving speeding in excess of 10 miles over the limit were found.

The summary is:

Policyholder clearly at fault	201	57.1%
Claimant clearly at fault	125	35.5%
Fault questionable	26	7.4%
	<u>352</u>	<u>100.0%</u>

The next part of the experiment was examination of 106 bodily injury cases, taken as they came, from several hundred files shipped to the home office of the insurance company from the East Orange, New Jersey, office. This group of files involved more serious and complex accidents.

It was found that the insured "at fault" or "not at fault" determination was clear in 90.4 per cent of the files.

There were 44 instances of "rearending". Two of these involved defects -- brake failure in one and in the other the pedal cover fell off. There were three cases in which one car backed into the other.

Of the 17 pedestrian cases, the insured was judged at fault in seven, not at fault in six (in one of these the pedestrian was drunk). Four were "questionable."

Of the 28 intersection cases, the insured was at fault in 18. In five of these he "ran the light." In nine cases the insured was judged not at fault, the other party "ran the light." Only one of the intersection cases was viewed as "questionable."

Of the eight head-on collision cases, one was caused by a heart attack; one when an unknown car forced the insured over the center line.

Six claims men at the manager or supervisor level were interviewed separately. They were not told what the figures showed. All six stated that in their opinion, as to the whole run of cases that they were responsible for, about 75 per cent were susceptible of easy decision upon the initial investigation and about 90 per cent upon the completion of the investigation.

If these tests are reliable enough to indicate anything, it is that in most cases fault is not difficult for trained claims men to determine. In the small cases it is easier than it is in the serious cases. No doubt we hear much more about the hard cases than we do about the easy ones. Judges and the lawyers are apt to be exposed to the most troublesome cases. Personal impressions are likely to be based on very biased samples.

Perhaps most of us would concede that testimony standing alone can at times be a frail basis for reconstructing an accident. Some-

times there are failures of memory or perception, and sometimes evil design plays a part. Some lawyers, especially those who are not much involved with tort work, have a sort of built-in skepticism about ability to learn how an accident really happened. Most lawyers, at some point in their schooling, probably were exposed to an account from Professor Wigmore's The Science of Judicial Proof showing what fantastic discrepancies develop in the stories people tell when they are asked to describe an event that they witnessed. But the significant part of the story is that after the experiment, 13 students chosen from the 60 who saw the incident testified before a jury of six. The stories didn't coincide well at all. Nevertheless, the jury succeeded in reconstructing the event with a high degree of accuracy.

In automobile cases reconstruction is much easier because the physical facts are of great assistance and often prevent what might otherwise be unreliable conclusions.⁹²

Conclusion as to feasibility of utilization of fault

We think it is fair to conclude, with appropriate reservations, that the argument that the fault system should be abolished because negligence is too difficult to determine, or because it is too difficult to learn how the accidents happened, is invalid. If there has been any effort made by those who think the fault concept is unworkable or who believe it amounts to little more than an "immoral lottery"⁹³ to support their conclusions by research, it has escaped our attention. No such research is reported by Professors Keeton and O'Connell.

Obviously the sample in the research reported above was rather small. Another experiment might not yield exactly the same results. But the indicated fact is that in over 90 per cent of all cases sampled the question of fault was clear. In many of these the physical facts tell the story. In most of these the conduct of the driver is the significant factor rather than road design, car design or equipment. The research points in the direction of the continued feasibility of the utilization of fault as the cornerstone of the system.

Dishonesty

Part of the criticism as to the unreliability of fault determinations, according to Keeton and O'Connell, is that "the present system is marred by temptations to dishonesty that lure into their snares a stunning percentage of drivers and victims." The support for this

⁹² Newton, Reconstruction: A Basic Tool in Determining Accident Causation, INS. COUNSEL J. 29 (1969).

⁹³ Franklin, Replacing the Negligence Lottery: Compensation and Selective Reimbursement, 53 VA. L. REV. 774, at 778 (1967).

shocking statement seems to be in the following passage:

"If one is inclined to doubt the influence of these debasing factors, let him compare his own rough-and-ready estimates of the percentage of drivers who are at fault in accidents and the percentage who admit it when the question is put under oath. Of course, the disparity is partly accounted for by self-deception, but only partly. And even this self-deception is an insidious undermining of integrity, not to be encouraged."⁹⁴

In the Massachusetts experiment described above it was found that policyholders were reporting facts clearly indicating that the policyholder himself was at fault in about 57 per cent of the cases. In many of these the policyholder stated a conclusion that he was at fault, along with his statement of the facts. This does not support free-swinging statements about dishonesty and deception.

Of course, when dealing with hundreds of thousands of people asserting claims, it is to be expected that there would be some exaggeration and dishonesty and sometimes outright plans or conspiracies to defraud. The experience of our Committee indicates that these instances are relatively rare and that the quotations stated above are exaggerations.

Moreover, the Committee is convinced that the adversary system, under which claims are subjected to investigation, cases are tried to a jury or before a professional judge, witnesses testify under oath, and are subject to cross-examination, liable to be punished for perjury, is a system well suited to the prevention of dishonesty and fraud.

3. The Doctrine of Contributory Negligence and Related Matters

We accept as valid the criticism that the doctrine of contributory negligence is antiquated and unrealistic. The fact that sometimes it is not strictly applied by claims adjusters or juries⁹⁵ probably has served to make its formal modification somewhat less imperative. But this is not a sufficient basis for further delaying a change. We do not regard such a change as an abandonment of the central concept of the negligence law--that liability should not be imposed in the absence of fault--but merely as the evolution of an ancient doctrine into a more modern and enlightened one.

94 KEETON & O'CONNELL 3.

95 Professor Kalven believes, however, that the view that juries have accomplished a de facto repeal of the contributory negligence rule is "a half truth at best." 21 VAND. L. REV. 902 (1968).

Effects of a Change to Wisconsin Type of System of Comparative Negligence

We believe that a change to a system of comparative negligence of the type found in Wisconsin, accompanied by universal financial responsibility, will accomplish, within the framework of the present common law tort system, a great advance toward the objectives of those who are critical of that system.

The difficulties in measuring degree of fault seem to have been sufficiently overcome in Wisconsin⁹⁶ to justify our confidence that we are not merely substituting a group of new difficulties for those experienced under the contributory negligence rule. If the Wisconsin statute is followed as a model, fewer cases will be denied any recovery, and the size of the award will be moderated. If it does not have a moderating effect, the result will be some increase in insurance costs.

The Wisconsin comparative negligence law (Wisconsin Statutes, Sec. 331.045) eliminates contributory negligence as a bar to recovery if the fault of the defendant is established and the defendant's negligence exceeds that of the plaintiff. Recovery is diminished proportionately to the negligence of the person recovering. For example, if 40 per cent of the negligence is attributed to the plaintiff, the damages are reduced by 40 per cent. If the attribution is 60 per cent to the plaintiff and 40 per cent to the defendant, there is no recovery. If the attribution is 50-50, there is no recovery.

Special verdicts are used. The jury answers specific questions, such as: Was the defendant negligent? If so, was the plaintiff's negligence a cause of the collision? If both defendant and plaintiff were negligent and taking the combined negligence as 100 per cent, what percentage is attributable to the defendant? To the plaintiff?

The next question the jury answers is what sum of money will fairly and reasonably compensate the plaintiff with respect to the various categories of damages. The judge does the rest. The jury is not to concern itself with the final amount. John A. Decker, a circuit court judge in Wisconsin, says that "Wisconsin trial lawyers and judges believe that the jury's application of comparative negligence is satisfactory" and states his opinion that "a comparative negligence system which permits the jury to reduce damages, and to know and determine the ultimate recovery, is wrong."⁹⁷

⁹⁶ Heft & Heft, Comparative Negligence: Wisconsin's Answer, 55 A.B.A.J. 127 (1969).

⁹⁷ 1 CONN. L. REV. 56 (1968).

Statutes of various states

Mississippi⁹⁸ provides that contributory negligence shall not bar recovery but that damages shall be diminished by the jury in proportion to the amount of negligence of the persons injured. Special verdicts are not used. Apparently it is possible for a plaintiff to recover even though his negligence is greater than the defendant's. This is the only state having such a statute. It is similar to the Federal Employer's Liability Act.

Nebraska⁹⁹ does not allow contributory negligence to bar recovery if the negligence of the plaintiff was slight and that of the defendant gross in comparison. The jury mitigates the damages in proportion to the amount of negligence attributed to the plaintiff.

Under the 1965 Maine¹⁰⁰ comparative negligence statute, if the plaintiff and defendant are equally at fault, the plaintiff does not recover. There is, however, no explicit statement that if the plaintiff's negligence is greater than the defendant's, he can't recover. The jury records the total damages and the extent to which they are to be reduced "having regard to the claimant's share in the responsibility."

In 1969 Minnesota became the ninth state to have a comparative negligence law. The act, sponsored by the Minnesota State Bar Association, is based on Wisconsin law.

Professor Prosser¹⁰¹ concludes that the chief problem is one of some protection for defendants through a restraint that will keep the jury in bounds and insure that apportionment will actually be made. He would rely on the Wisconsin procedure, or something like it, to keep the jury under control.

"Before and After" Survey in Arkansas

In the nature of things it is difficult to make a precise prediction of the effect a change to comparative negligence will have in a particular state. Professor Rosenberg made a before and after survey in Arkansas.¹⁰² In 1955 Arkansas adopted a comparative negligence statute. It went "all the way," i.e., the plaintiff could recover even if his negligence was greater than the defendant's. Special verdicts were required. Two years later the statute was repealed as having caused "great confusion and unfairness." It was replaced by a statute which allowed recovery only when the plaintiff's negligence was of less

98 MISS. CODE §5

99 NEB. REV. STAT. §5

100 ME. REV. STAT. ch. , §5

101 51 MICH. L. REV. 465 (1953).

102 13 ARK. L. REV. & BAR ASS'N J. 89 (1959), reprinted in 36 N.Y. ST. B. J. 457 (1964).

degree than the defendant's. The study attempts to gauge the effect of the 1955 statute. Some of the conclusions are: (1) the work loads of the courts were substantially unchanged, (2) there were more claims, (3) settlement values increased, (4) plaintiffs won more verdicts, and (5) verdict size was unchanged. We are unaware of any similar study of the effect of the 1957 statute.

In 1967 the Illinois Appellate Court, Second District, held that contributory negligence rule would no longer apply in Illinois and that in lieu thereof the Wisconsin rule would apply.¹⁰³ On appeal the Illinois Supreme Court, in a 5-2 opinion, reversed, and held that such a change should be by legislative action.¹⁰⁴

After studying the four types of laws set forth above, we have come to the conclusion that those of the Mississippi type, which allow the plaintiff to recover even if his negligence exceeds that of the defendant, go too far in abolishing fault as the basis for recovery. We have also concluded that laws of the Nebraska type, which allow the plaintiff to recover if his negligence was slight in comparison to that of the defendant but which lack the special verdict procedure in support of the mitigation process, placed too much reliance on a vague standard and lack sufficient assurance that the mitigation will in fact occur.

As respects automobile accident cases, we recommend that the states adopt a Wisconsin type of comparative negligence system supported by a special verdict procedure.

Contribution Among Joint Tortfeasors

A decision to change to a Wisconsin type of comparative negligence system should be accompanied by a review of contribution among joint tortfeasors in automobile accident cases.

In the past the general policy of American common law has been to deny assistance to tortfeasors, who, as wrongdoers, did not deserve the aid of the courts in assisting them to distribute the burden among themselves. This policy made it possible for the injured person, if the injury resulted from the joint and several tort of two or more, to place the loss upon which of the feors he chose.

The American Law Institute and the National Conference of Commissioners on Uniform State Laws sponsored the preparation of a uniform act that would reflect a considered policy toward the problem. This effort resulted in 1939 in the Uniform Contribution Among Tortfeasors

¹⁰³ Maki v. Frelk, 229 N.E. 2d 284.

¹⁰⁴ 239 N.E. 2d 445 (1968). See comments on this case in 21 VAND. L. REV. 889 (1968), in which Professor Kalven refers to it as "a return to sanity."

Act, which was withdrawn for further study after having been adopted in some form in eight states. The 1955 uniform act¹⁰⁵ is a revision of the 1939 act and aims at reconciling variations that had developed. Through 1967 it had been adopted in two states, Massachusetts and North Dakota. Tennessee subsequently adopted it. There are also eight states having statutes respecting contribution among joint judgment defendants, and six states having a general statute (including Wisconsin) that leave the details to the courts, and some states recognize a right of contribution in the absence of statute.

The question is whether a state that adopts a comparative negligence statute of the sort we recommend should also adopt a form of contribution among tortfeasors which accepts the proposition that contribution should be proportionate to the percentage of causal negligence.

The uniform act denies a right of contribution in favor of a tortfeasor who has intentionally caused or contributed to the injury. The drafters regarded this provision as eliminating most of the arguments in favor of a rule allocating shares of liability on the basis of relative degree of fault. Thus, when they came to state the principle that should govern the determination of pro rata shares, the provision was included that "their relative degrees of fault shall not be considered."

The problem was examined by the Wisconsin Supreme Court in *Bielski v. Schulze*, 114 N.W. 2d 105 (1962), in an opinion by Justice Hallows. The conclusion reached was that the method of contributing in equal shares was not as equitable and just as determining the amount of the shares in proportion to the percentage of causal negligence attributable to each tortfeasor.

"...There is no reason in logic or in natural justice why the share of common liability of joint feasors should not be translated into the percentage of the causal negligence which contributed to the injury. [It is] difficult to justify... why a joint tort feasor who is 5% causally negligent should only recover 50% of the amount he paid to the plaintiff from a co-tortfeasor who is 95% causally negligent, and conversely why the defendant who is found 5% causally negligent should be required to pay 50%... to the co-tortfeasor who is 95% negligent."

We agree. The logical consequence of adopting a comparative negligence statute of the Wisconsin type, supported by a special verdict procedure, is to require tortfeasors to contribute proportionately to the percentage of causal negligence attributable to each. We recommend that states that adopt the Wisconsin type of comparative negligence system make statutory provision for contribution among joint tort feasors proportionately to the percentage of causal negligence attributable to each.

¹⁰⁵ 9 U.L.A. 233 and pocket part.

The Last Clear Chance Rule

The last clear chance doctrine holds that a plaintiff may recover notwithstanding his own contributory negligence if the defendant, by proper care, could have avoided injuring the plaintiff. To those who view this rule as a response to the harshness of the contributory negligence doctrine,¹⁰⁶ it seems clear that abolition of the doctrine of contributory negligence should be accompanied by the demise of the last clear chance rule. But the Committee refrains from making a specific proposal to this effect from deference to those who have not regarded such a result as a necessary one¹⁰⁷ and because the Committee does not desire to make a firm assertion that repeal of the last clear chance rule should be by a particular form of statute rather than by judicial decisions responsive to the circumstances that will exist in the states after contributory negligence has disappeared.

We recommend that, as respects automobile accident cases, states in which contributory negligence is abolished should consider the abolition of the last clear chance rule.

4. Immunities

Our special concern with immunities from tort liability is confined to injuries caused by the negligent operation of automobiles.

If the system of basing recovery of damages for injuries received in automobile accidents is to continue to depend in the main on the law of negligence, it is advisable to reexamine some of the legal barriers to recovery. Barriers that do not bear on the question of fault and are no longer necessary as matters of public policy are open to challenge. If they continue to exist for historical reasons and with the passage of time have become mere holdovers because of inertia and difficulties of change, they should now be modified. If these doctrinal impediments to the recovery of damages can be removed, one of the persistent criticisms of the present system (that not all deserving claimants are recompensed for their damages) will become less significant.

¹⁰⁶ James, Last Clear Chance: A Transitional Doctrine, 47 YALE L. J. 705 (1938); MacIntyre, The Rationale of Last Clear Chance, 53 HARV. L. REV. 1225 (1940); PROSSER, LAW OF TORTS § 65 (3d Edition); Annot., 59 A.L.R. 2d 1261.

¹⁰⁷ Hickman v. Parks Construction Co., 76 N.W. 2d 403 (Neb. 1956); Malcom v. Dox, 100 N.W. 2d 538 (Neb. 1960); Bezdek v. Patrick, 103 N.W. 2d 318 (Neb. 1960); Nielsen v. Richman, 299 N.W. 74 (S.D. 1941); Haase v. Wellers Truck Service, 34 N.W. 2d 313 (S.D. 1948); Vlach v. Wyman, 104 N.W. 2d 817 (S.D. 1960); Smith v. American Oil Co., 49 S.E. 2d 90 (Ga. App. 1948). See also, The Validity of Retaining the Last Clear Chance Doctrine in a State Having a Comparative Negligence Statute, 1 GA. ST. B. J. 500 (1965).

It is in this spirit that we have considered some of the immunities that can be pleaded by negligent defendants as defenses to otherwise valid claims.

A. Governmental Immunity

We need not concern ourselves very much with the complex questions which present themselves in connection with efforts to make sweeping changes in the doctrines of governmental immunity. Nor do we feel that there would be any special value in stating our views as to whether those sweeping changes ought to be made. But as respects the imposition of liability upon governments, their officers and other representatives for injuries negligently inflicted on the innocent victims of automobile accidents, surely almost everyone would agree that governmental immunity should be abrogated. None of the justifications for the rule seem to have any persuasive relationship to the question of whether the cost of automobile-inflicted injuries should rest upon the victim or upon the tortfeasor.

The Federal Government, through the Federal Tort Claims Act,¹⁰⁸ has set an example that the states should follow, applying their own judgments in the light of experience under that act as to the precise scope of the waiver. But only a few states have enacted statutes making the state liable for motor vehicle torts.¹⁰⁹

During the last decade, however, there has been a marked trend toward restricting the scope of governmental immunity by judicial decision, especially as respects municipal corporations. The courts seem more and more inclined to narrow the scope of governmental immunity, to widen the concept of proprietary activities and to deny the soundness of the original reasons for such immunity.

There are nine states in which the courts have held the exemption of a municipal corporation to be anachronistic holdover from ancient times.¹¹⁰

¹⁰⁸ 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671 and 2680.

¹⁰⁹ California, Wisconsin and New York are listed in PROSSER, LAW OF TORTS 1010, notes 33, 34, 35 and 36 (3d ed.)

¹¹⁰ Florida, Illinois, California, Michigan, Wisconsin, Arizona, Minnesota and Alaska are listed in PROSSER, *supra* note, at 1012. Nebraska joined the group in 1968 with *Brown v. City of Omaha*, 160 N.W. 2d 805. For a generous list of authorities on both sides and an interesting discussion of the difficulties encountered when abrogation is by judicial decision, see *Williams v. City of Detroit*, 111 N.W. 2d 1 (Mich. 1961).

Justice Holmes once wrote: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."¹¹¹

Our recommendation is that the doctrine of governmental immunity, as respects states and municipalities and their departments, commissions, boards, institutions, arms or agencies, be abrogated so as to make such defendants liable for injuries and damages negligently inflicted through their operation, maintenance or use of automobiles.

B. Immunity of Charitable Organizations.

Our particular concern with respect to charitable immunity is limited to injuries and damages caused by the negligent operation of automobiles.

Since the landmark opinion by Justice Rutledge, for the United States Court of Appeals for the District of Columbia Circuit, in *President and Directors of Georgetown College v. Hughes*, 13 F. 2d 810 (1942), the law has been moving rapidly in the direction of abolition of the traditional immunity of charitable organizations. All the various justifications for immunity have been criticized by courts and legal writers, and the doctrine is hopelessly out of tune with the times. It is difficult to become alarmed about any possible adverse effects following abolition of the doctrine in automobile cases. To refuse to allow an injured person to recover merely because of the charitable organization status of the defendant shocks the modern conscience.

We recommend the abrogation of the doctrine of immunity of charitable organizations with respect to injuries and damages inflicted by the use of automobiles.

There follow two schedules showing, as of December of 1965, the status of the charitable immunity rule. They are taken from an article by Andre R. Sigourney in the December, 1965, issue of the Boston Bar Journal.

JURISDICTION WHERE THE DOCTRINE HAS BEEN ABOLISHED (CHRONOLOGICALLY)

Jurisdictions	Case or Statute	Year
England	<i>Hillyer v. Governors of St. Bartholomew's Hospital</i> , 2 K.B. 820 (1909)	1909
Canada	<i>Nyberg v. Provost Municipal Hospital</i> , 1927 S.C.R. 226	1927

¹¹¹ HOLMES, COLLECTED LEGAL PAPERS 187.

New Zealand	Logan v. Waitaki Hospital, 1935 N.Z.L.R. 385	1935
Oklahoma	Sisters of Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P. 2d 996 (1938)	1938
New Hampshire	Welsh v. Frisbie Memorial Hospital, 90 N.H. 337, 9 A. 2d 761 (1939)	1939
Utah	Sessions v. Dee Memorial Hospital, 94 Utah 460 (1941)	1941
District of Columbia	Georgetown College v. Hughes, 130 F. 2d 810 (D.C. Cir., 1942)	1942
Minnesota	St. Paul v. St. Joseph's Hospital, 212 Minn. 558 (1942)	1942
North Dakota	Rickbell v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W. 2d 247 (1946)	1946
Iowa	Haynes v. Presbyterian Hospital Ass'n., 241 Iowa 1269, 45 N.W. 2d 151 (1950)	1950
Vermont	Foster v. Roman Catholic Diocese, 116 Vt. 124, 70 A. 2d 230 (1950)	1950
Arizona	Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220 (1951)	1950
California	Malloy v. Fong, 37 Cal. 2d 356, 232 P. 2d 241 (1951)	1951
Delaware	Durney v. St. Francis Hospital, 46 Del. 350, 83 A. 2d 753 (1951)	1951
Puerto Rico	Puerto Rico Gas v. Rullon, 189 F. 2d 397 (1951)	1951
Alaska	Moats v. Sisters of Charity, 13 Alaska 546 (1952)	1952
Mississippi	Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1952)	1952
Florida	Wilson v. Lee Memorial Hospital, 65 So. 2d 40 (1953)	1953
Kansas	Marks v. St. Francis Hospital, 179 Kan. 268, 294 P. 2d 258 (1956)	1956
Nevada	Nev. Rev. Stat. Sect. 41 480 (1957)	1957
New York	Bing v. Thunig, 2 N.Y. 2d 660, 163 N.Y.S. 2d 3 (1957)	1957
New Jersey	Da Hon v. St. Luke's Hospital, 361 14 A. 2d 273 (1958)	1958
Michigan	Parker v. Port Huron Hospital, 361 Mich. 1, 105 N.W. 2d 1 (1960)	1960
Kentucky	Sheppard, 353 S.W. 2d 212 (Ky., 1961)	1961
Montana	Howard v. Sisters of Charity, 193 F. Supp. 191 (1961)	1961
Wisconsin	Duncan v. Sleepe, 17 Wis. 2d 226, 116 N.W. 2d 154 (1962)	1962
Oregon	Hungerford v. Portland Sun, 234 Or. 412, 384 P. 2d 1009 (1963)	1963
Washington	Friend v. Cone Methodist Church, 396 P. 2d 546 (Wash. 1964)	1964

Pennsylvania	Flagielle v. Penn. Hospital, 417 Pa. 486 208 A. 2d 193 (1965)	1965
West Virginia	Adkins v. St. Francis Hospital, July 13, 1965	1965
Illinois	Darling v. Charleston Hospital, 211 N.E. 2d 253 (1965)	1965

STATES WHERE THE DOCTRINE EXISTS IN WHOLE OR IN PART (ALPHABETICALLY)

States	Case or Statute	Qualifications
Alabama		
	Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4 (1918)	Liability for paying patients only
Arkansas		
	Michael v. St. Paul Mercury Indemnity Co. 92 F. Supp. 140 (W.D. Ark., 1950)	Liability limited to insurance coverage only
Colorado		
	St. Luke's Hospital ass'n. v. Long, 125 Colo. 25, 240 P. 2d 917 (1952)	Liability limited to non- charitable funds
Connecticut		
	Cohen v. General Hospital Society, 113 Conn. 188, 154 A. 435 (1931)	Liability for strangers only
Georgia		
	Hospital Authority v. Misfeldt, 99 Ga. App. 702. 209 S.E. 2nd 816 (1959); Morton v. Savannah Hospital, 148 Ga. 438, 96 S.E. 887 (1918); Cox v. DeJarnette, 104 Ga. App. 664, 123 S. E. 2d 16 (1961)	Liability for strangers; lia- bility for paying patients; liability limited to insurance coverage only.
Idaho		
	Wheat v. Latter Day Saints Hospital, 78 Idaho 60, 297 P. 2d 1041 (1956)	Liability for strangers only
Illinois		
	Moore v. Moyle, 405 Ill. 555, 92 N. E. 81 (1950)	Liability limited to non- charitable funds
Indiana*		
	Richardson v. St. Mary's Hospital, 191 N.E. 2d 337 (Ind. App., 1963)	Liability for strangers only
Louisiana		
	D'Antoni v. Sara Mayo Hospital, 144 So. 2d 643 (La. App. 1962)	Liability limited to insurance coverage only
Maryland		
	State v. Arundel Park Corporation, 218 Md. 484, 147 A. 2d 427 (1958)	Liability limited to insurance coverage only
Maine		
	Public Laws of 1965 Chapter 383, General Laws, Title 14, Sec. 156	Liability limited to insurance coverage only
Massachusetts		
	Grueninger v. Harvard College, 343 Mass. 338, 178 N.E. 2d 917 (1961)	Liability limited to commercial activities

*Doctrine of charitable immunity was repudiated in 1968. Harris v. Y.M.C.A., 273 N.E. 2d 242 (1968).

Missouri

Blatt v. Nettleton Home, 365 Mo. 30, 275 S.W. 2d 344 (1955) Liability limited to commercial activities

Nebraska

Duncan v. Nebraska Sanitarium Hospital, 92 Neb. 162, 137 N.W. 1120 (1912) Total immunity

North Carolina

Barden v. Atlantic Coast Line R. Co., 152 N.C. 318, 675, 971 (1910) Total immunity

Ohio

Gibbon v. Y.W.C.A., 170 Ohio St. 280, 164 N.E. 2d 563 (1960) Blankenship v. Alter, 171 Ohio St. 65, 167 N.E. 2d 922 (1960) Liability limited to hospitals only; liability limited to commercial activities

Rhode Island

Basabo v. Salvation Army, 35 R.I. 22, 85 A. 120 (1912) Liability for strangers only

South Carolina

Eiserhardt v. Society, 235 S. C. 305, 111 S.E. 2d 568 (1959) Liability limited to commercial activities

Tennessee

Spivey v. St. Thomas Hospital, 31 Tenn. App. 12, 211 S.W. 2d 450 (1947) Liability limited to non-charitable funds

Texas

Baptist Hospital v. Marrable, 244 S.W. 2d 567 (Texas, 1951) Liability for paying patients only

Virginia

Memorial Hospital v. Oakes, 200 Va. 878, 108 S.E. 2d 388 (1959) Liability for strangers only

Wyoming

Bishop Randall Hospital v. Hartley, 24 Wyo. 408, 160 P. 385 (1916) Total immunity

JURISDICTIONS WHERE THE DOCTRINE HAS NEVER BEEN PASSED ON BY CASE OR STATUTE (ALPHABETICALLY)

Hawaii

New Mexico

South Dakota

C. Intra Family Immunities

1. Spouses

Many years ago the states began the process of abolishing the legal fiction of the oneness of husband and wife. Today it is rare for a state not to allow a married woman to own and control her property, to sue or be sued without her husband's consent or joinder, or to hold a married woman personally and separately liable for her

torts. But when it comes to the question of whether a wife may sue her husband, or a husband his wife, for injuries negligently inflicted in an automobile accident, more than half of the states will answer in the negative.¹¹²

Usually the reason given is that these suits would tend to destroy domestic tranquility, but occasionally the realistic reasons, danger of fraud and of collusive suits with intent to mulct the insurance company, are stated. Of course, insurance companies are not devoid of ability to protect themselves, because policies require the insured to cooperate with the company, and it would be a rare jury that did not view intra spouse suits with some skepticism.

We think the time has come to abolish this immunity in automobile cases, and we so recommend.

2. Children

The general rule is that suits for damages based on negligence brought by the parent against his minor child, or by the minor child against his parent, are not permitted. Again, the policy of not disturbing family harmony and the fear of fraud and collusion are the reasons frequently given for refusing to require the tortfeasor or his insurer to compensate for the damages suffered.

But some erosion of the rule has been occurring. In 1963 Wisconsin virtually abolished the doctrine.¹¹³ California has abolished intra-family immunities, except that an unemancipated child cannot maintain a negligence action against his parents.¹¹⁴ The move toward abolition of this immunity has been given fresh impetus by the recent decision of the New York Court of Appeals in *Gelbman v. Gelbman*, 297 N.Y.S. 2d 529 (1969). The court, reversing its earlier view, held that parents and their minor children may sue each other. The court's previous view was that the immunity concept could not be rejected without changing the entire fabric of society. Noting that the presence of compulsory insurance "effectively removes the argument favoring continued family harmony as a basis for prohibiting such suit" and in spite of legislative inactivity after a decision on the subject in 1962, the court reversed the view it had held for forty-one years.

¹¹² PROSSER, LAW OF TORTS 882 (3d ed.) This book also gives a list of legal writings on the general subject at 879, note 2.

¹¹³ *Goller v. White*, 122 N.W. 2d 193. See Annot., 19 A.L.R. 2d 423.

¹¹⁴ WILKINS, SUMMARY OF CALIFORNIA LAW §§ 47 and 48. But also see *Klein v. Klein*, 58 Cal. 2d 692, 376 P. 2d 70 (1962).

The danger of fraud and collusion in cases in which liability insurance is in effect can scarcely be denied. Does the desirability of making compensation for damages available outweigh these dangers? We are inclined to think it does. As we noted above, insurers are not without ability to safeguard themselves, and we encourage the development of policy provisions that attempt to provide for at least limited compensation even if the old defense is still available. For automobile cases, we recommend the abrogation of parent-child tort immunity.

5. Automobile Guest Statutes

Critics of the present system state that the guest statutes in effect in some 27 states¹¹⁵ are obstacles to a reform of the present system to make it a less uncertain method of compensating injured persons. But the purpose of these statutes is to put a barrier in the way of vexatious litigation resulting from collusion between the host and the guest.¹¹⁶ They do not confer immunity from liability but impose a greater burden on the guest plaintiff. They are in derogation of the common law rule that the host owes the duty of ordinary care to a guest, and they have been strictly construed. They are phrased in numerous forms: requiring "international misconduct," "willful misconduct," "willful and wanton misconduct," "heedless and reckless disregard" and "gross negligence." Courts sometimes have had difficulty with these definitions.

In spite of some assertions that these statutes are not in tune with the times¹¹⁷ and many legislative proposals to repeal them,¹¹⁸ only one state (Connecticut) has repealed its guest law in recent years.

These statutes are not mere holdovers from ancient times, as in the case of the doctrine of charitable immunity. They are of comparatively recent origin--most of them having been enacted in the late twenties and early thirties. While the inducing fact, in at least some states, seems to have been the then prevalence of hitchhikers on the high-

¹¹⁵ Automobile Guest Laws Today, 27 INS. COUNSEL J. 223 (1960), is a useful compilation of information.

¹¹⁶ Mackey, Liability Under Automobile Guest Statutes, 1 WYO. L. J. 182 (1947).

¹¹⁷ PROSSER, LAW OF TORTS 191 (3d ed.); 2 HARPER & JAMES, LAW OF TORTS 961-962 (1956); Clark v. Clark, 222 A. 2d 205, at 210 (N.H. 1966).

¹¹⁸ In 1965 unsuccessful attempts to repeal guest statutes were made in California, Colorado, Iowa, Illinois, Nebraska, Indiana, Montana, North Dakota, South Dakota and Wyoming. In 1967 unsuccessful attempts were made in Alaska, California, Colorado, Hawaii, Nevada, New Mexico, Ohio, Indiana, Kansas and Wyoming.

ways,¹¹⁹ it cannot be said that these statutes lack relevant justification today in terms of deterring collusive suits and as an expression of the feeling that it is inequitable to permit a guest to profit from the ordinary negligence of his host who was in the process of conferring a benefit upon the guest. A recent case also has attributed to the statute a purpose of assuring that injured parties in other cars will have a better claim against the limited assets of the negligent defendant.¹²⁰

Evidently, they do reflect the public policy of the states that have them. Their repeal would have a marked upward (and apparently unacceptable) effect on insurance costs in the states having them.¹²¹ These upward effects bear directly on the individual buyer of insurance and thus are to be distinguished from the effect of abolishing the doctrines of charitable and governmental immunities.

We do not regard guest statutes as a major criticism. The decision to retain or repeal them is an uncomplicated one and should be left to the states without recommendation from us.

6. Rules for the Ascertainment of Damages in Automobile Accident Cases

One of the characteristics of our present automobile accident reparations system is that the decision as to how much the claimant should be paid, if he is to be paid, is made on a case-by-case basis. Damages are determined on an individual basis rather than by applying a predetermined schedule of benefits.

Underlying Principle

Damages are not awarded unless the defendant was at fault. The underlying principle is that they should compensate for the injury. The damage principle has some side effects that have value to society -- it deters other people from conducting themselves with such disregard for reasonable standards of care as to become liable for damages. While punishment is not the chief aim, financial detriment is a form of pun-

¹¹⁹ Tipton, Florida's Automobile Guest Statute, 11 U. FLA. L. REV. 287 (1958).

¹²⁰ Dym v. Gordon, 209 N.E. 2d 792, at 794 (N.Y. 1965).

¹²¹ While there are states with guest statutes in which rates are higher than certain states without guest statutes, the average rate in the highest rated territory in the states with guest statutes was \$45 at the time computations were made, as compared with \$61 in states not having guest statutes. For the lowest rated territories, the comparison was \$25 to \$33. Other factors affect rates also, and no assertion is made that the differences noted are attributable chiefly to the presence or absence of a guest statute. Figures are from N.A.I.I.

ishment, and if the defendant's conduct was outrageous, in the sense of constituting an intentional wrong, punitive damages may be allowed with the direct purpose of punishment.

The implementation of these simple principles has resulted in the development of a marvelously flexible and sophisticated system for making awards of damages commensurate with the damages sustained and to be sustained in the future. The system depends in large measure on the common sense and perceptivity of the jury, which in "wisely unscientific" ways that sometimes defy analysis manages to cope with some great difficulties.

What We Expect the Jury To Do

Consider some of the things we expect the jury to do:

To fix not only compensatory damages, but sometimes exemplary damages.

To establish an amount to compensate for pain and suffering.

To fix the damages for mental distress, not only functional mental disturbance but also such things as fear and worry.

To predict what future losses will be and include them in a single award.

To measure lost profits when they are certain enough.

To compensate for loss incurred by the plaintiff in his efforts to minimize the loss caused by the defendant's act.

To compensate for loss of earnings, even if the plaintiff was out of a job when he was hurt.

To compensate for loss of earning capacity, as well as for loss of earnings, even though it is not known whether the plaintiff would have used his capacity.

To allow for the future earning capacity of a child who now has none.

To place a money value on disfigurement, on inability to have children and on diminution of the likelihood of marriage.

To place a value on medical services to be rendered in the future.

To take care not to be prejudiced by the plaintiff's or defendant's race, color or appearance, or that of his lawyer.

In spite of the difficulties, the system does work, and with a high degree of success.

The complaints that are made against the present system do not assert that the elements that go to make up compensatory damages are improper. Rather, the argument runs, damages should not be paid in a lump sum but periodically, estimates of future losses are uncertain, the plaintiff's or defendant's appearance has too much influence, pain and suffering is unmeasurable, rehabilitation is discouraged because the plaintiff wants to appear as crippled, the plaintiff's lawyer charges too much, and sometimes the jury is stingy or overgenerous.

Would Another Approach Yield Better Results?

We shall not at this point comment on these criticisms. Rather we direct attention to what we believe is the really pertinent question. It is not whether one can find some basis for complaint about the damage rules, but rather whether some other approach would yield better results.

It should be obvious that doing away with the fault system won't solve the question of "how much." Any system which attempts in automobile cases to fix the damage amounts by establishing a schedule of payments to be made for specific injuries is bound to involve many inequities. More than in workmen's compensation, because there the range of economic loss is narrower and the problem of children, wives, retired people and other non-wageearners is not present. Such a system is too simplistic to be appropriate for making reparation for automobile-caused injuries.

Efforts to escape this horn of the dilemma by a formularization of the damages in some cases only and retention of the present system, or something resembling it, for other cases are open to both sets of criticisms--too simplistic at the lower end of the spectrum, too sophisticated at the upper.

Consideration of Specific Complaints

Anything so difficult and complex as establishing proper amounts of damage will produce an aberration from time to time. These are correctible by remittiturs and additurs.

Probably it would be better in some cases to avoid large lump-sum payments. There is no immovable reason why the parties cannot agree upon installment payments. These agreements are becoming commonplace in connection with the "advance payment" plans, and we see no reason not to anticipate further development of the periodic payment idea. That the periodic payment plan is useful in helping the plaintiff not to squander his money, we are not convinced. Credit buying, readily available if the plaintiff is entitled to periodic payments, offers a quick way of overspending. There are some cases in which the substantial lump sum is of special value, and an inflexible rule about periodic payments will not in all instances, serve the best interests of the plaintiff.

If there are cases in which the plaintiff delays his recovery in the hope of larger damages, they must be rare. Early rehabilitation is to be encouraged. In recent years the economic common sense of seeking the maximum degree of restoration has been recognized by several insurance carriers and ways of applying rehabilitation methods to automobile cases, as well as workmen's compensation cases, have been developed by the larger insurance companies. But the vision of rehabilitation as holding the key to a great transformation needs some tempering.

The actual number of cases which clearly lend themselves to full scale rehabilitation is much smaller than some of the literature suggests.¹²²

As to the effect of a party's appearance in court, this is a speculative criticism. It is the opinion of the Committee that sincerity is of greater significance.

That the value of pain and suffering is difficult to determine is not to say that satisfactory evaluations do not occur, and on a routine basis. The alternatives would seem to be to establish some formula relationship to other more objectively determined damage elements or to give up trying to place a money value on this element of damage. Both of these courses involve their own problems. We do not favor abandoning the effort to compensate for pain and suffering.¹²³

The Collateral Source Rule

One part of the Keeton-O'Connell proposal is that the no fault benefits under it be excess over benefits from collateral sources (i.e., health insurance benefits, accident insurance, workmen's compensation, social security disability benefits, medicare, veterans' benefits, union welfare plans, wage continuation plans, etc.). The plan proposed by the American Insurance Association would ignore benefits from collateral sources. It proceeds on the premise that the motoring public should bear the cost.

Yet neither of these proposals, since they create and define the scope of benefits under new plans for compensating without regard to fault, really bear upon the question of what, if anything, should be done about the collateral source rule in its application to tort cases.

The rule, in effect in some form in every state except Alabama,

¹²² Marryott & Cook, Rehabilitation of Claimants in Tort Cases, 29 INS. COUNSEL J. 231 (1962).

¹²³ AUTOMOBILE ACCIDENTS COSTS AND PAYMENTS 265 states that 76 per cent of the respondents thought that a settlement should include compensation for pain and suffering. A group of 378 was questioned, and all of them had been involved recently in a personal injury claim.

is part of the basic law of our country and may be viewed as essentially a rule of evidence. The defendant may not introduce evidence, in mitigation of damages, that the plaintiff has available to him or has received benefits from "collateral sources" unless the source was one provided by the defendant himself -- as in medical payments coverage.¹²⁴ It is beneficial to claimants since it allows them to retain benefits they provided for themselves, such as personally paid for accident and health benefits. It also allows them to retain benefits provided by others, e.g., the employer, as part of the contract of employment, such as benefits under wage continuation plans, hospital care plans, etc.

The standard reasoning is that as a matter of simple justice the plaintiff should not be deprived of the benefits of his own thrift, whether that thrift took the form of buying accident and health insurance from his own pocket or of having an employment contract that involves the continuation of wages during disability. If it comes down to a choice between giving the injured plaintiff the benefit of the "windfall" or giving a credit to the negligent defendant in the form of a reduction of the damages he caused, it is the plaintiff who has the better claim. A statutory change, even if acceptable to legislatures, would deprive people of the benefit of their own thrift and transfer such benefits to the negligent defendant or his insurer.

Efforts to change the rule so that plaintiffs could not include these amounts in their proof of damages may well turn out to have merely the effect of bringing about changes in the provisions of such collateral benefit plans so as to exclude automobile cases from their scope. In that event the defendant is not benefited, automobile liability insurance rates are not affected, but the plaintiff may be seriously harmed.

Refinements of the doctrine, such as permitting evidence of the plaintiff's receipt of collateral benefits if they were paid for by the defendant himself, will doubtless develop without the need of specific legislation. Today the judgment debtor gets credit, in one way or another, for payments made to the plaintiff under the medical payments coverage which the defendant himself provided. The collateral source rule is inapplicable in such situations. No statutory change is necessary to accomplish this result.¹²⁵

Other evolutionary changes will occur. For example, the New Jersey Supreme Court has held that to suppress mention of the fact of remarriage of a claimant who seeks damages on account of the death of

¹²⁴ Moore v. Leggette, 264 N.Y.S. 2d 765 (App. Div. 2d 1965), aff'd, 276 N.Y.S. 2d 118 (1966).

¹²⁵ Annot., 11 A.L.R. 3d 1115 and 25 A.L.R. 3d 1091.

her former husband is offensive to the integrity of the judicial process.¹²⁶ A correction of this kind is attainable without disturbing the rule that the remarriage is not a factor to be considered in determining damages.

Some broad policy questions are involved. It is not advisable to saddle programs regarded as so beneficial to society as a whole as to warrant the imposition of taxes for their support with the cost of motor vehicle accidents. Is it unwise to obscure the true dimensions of the motor vehicle reparation problem by removing some of the costs of automobile accidents from motorists as a group and burying them in the costs of other programs.

We believe that the collateral source rule should be retained, and we so recommend.¹²⁷

Special Status of Workmen's Compensation Benefits

The status of workmen's compensation benefits is somewhat of a special situation. There the usual rule is that if the compensable injury was caused by a third person, such as a negligent motorist, the workmen's compensation insurer has a lien upon the amount of the recovery in the negligence case. The effect is to shift from the workmen's compensation system, which is essentially a social insurance plan which imposes costs upon employers regardless of negligence, some of its costs--those attributable to the negligent third party.

Income Taxes on Damage Awards

Under Sec. 104(a) (2) of the Internal Revenue Code of 1954 the amount of any damages¹²⁸ received on account of personal injuries (or

¹²⁶ *Dubil v. Labate*, 245 A. 2d 177 (1968).

¹²⁷ See Lambert, *The Case for the Collateral Source Rule*, 524 INS. L. J. 531 (1966); Peckinpugh, *An Analysis of the Collateral Source Rule*, 524 INS. L. J. 545 (1966); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964); Beckham, *The Collateral Source Rule is Sound*, in 1965 PROCEEDINGS OF THE A.B.A. SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 310; Defendants Go Where Plaintiffs Fear To Tread, 35 TENN. L. REV. 353 (1968).

¹²⁸ "Damages" are defined by Trea. Reg. § 1.104-1(c) as "an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement entered into in lieu of such prosecution." Punitive damages are included in gross income by Trea. Reg. § 1.61-14(a), while workmen's compensation and proceeds from accident and health insurance are not.

sickness) is excluded from gross income. The probable explanation underlying this provision seems to be that Congress doubted that these damages were properly to be regarded as "income" in the sense of the Sixteenth Amendment to the Federal Constitution giving Congress power to "lay and collect taxes on income from whatever source derived ..."¹²⁹ This amendment became part of the Constitution February 25, 1913. In 1913 Mr. Justice Pitney defined income as "The gain derived from capital, from labor, or from both combined,"¹³⁰ and this definition was reiterated in *Eisner v. Macomber*, 252 U.S. 189 (1920).

In view of this history, we do not analogize the benefits the rule confers on the plaintiff to those he receives under the collateral source rule.¹³¹ There is little or no support for the idea that Congress desired to confer a benefit on claimants. The retention of the tax benefits cannot be justified on logical grounds. It is a mere "windfall," which the claimant has done nothing to provide. In contrast, the usual collateral source benefit is one provided by the claimant's own thrift and prudence. Under these circumstances when the choice must be made, the plaintiff has a better claim than the defendant.

A plaintiff who recovers for loss of earnings on a pretax basis is better off than had he earned and been taxed for the same amount of money. Therefore, several of the plans for reform of the automobile tort system include some provision to cope with this absurdity of the tax windfall. For example:

(1) The Keeton-O'Connell Plan (Sec. 1.10(a) of the Proposed Basic Protection Act) would subtract up to 15% in calculating "net loss." if the claimant proves a lower value, the lower value is subtracted in calculating "net loss."

(2) The American Insurance Association Plan states "Since insurance benefits are not treated as taxable income, loss of income from work would be adjusted to reflect income tax advantages incident to such non taxable payments. For convenience, it would be presumed that the value of the tax advantage equals 15% of the loss of income, subject always to proof of a lower value by the claimant."

(3) The Cotter Plan includes a proposed statute to the effect that damages for past and future earnings loss shall be computed net

¹²⁹ Knickerbocker, The Income Tax Treatment of Damages, 47 CORN. L. Q. 429 (1962).

¹³⁰ *Strattons Independence Ltd. v. Howbert*, 231 U.S. 399.

¹³¹ But see, *Mitchell v. Emblade*, 289 P. 2d 1034 (Ariz. 1956); *Hall v. Chicago & North Western Ry. Co.*, 125 N.E. 2d 77 (Ill. 1955).

of income taxes. The set-off as to prospective earnings is taken as 15 per cent in the absence of proof of a smaller figure. The actual set-off is used as to past earnings loss.

It hardly seems prudent, assuming a desire to retain the tort system and the present rules for the ascertainment of damages on a case by case basis, to permit proposals for such clearly needed reforms to come only from those whose reform programs involve other and less acceptable changes. This adjustment of the damage rules to the tax facts of life is the sort of evolutionary change that should develop within the system itself. But so far only a few states have come to grips with the problem and modified the rule that testimony or instructions as to the tax-free nature of the award should be kept from the jury.¹³²

We shall not undertake to analyze the slowness of our courts to follow the 1956 House of Lords decision in *British Transportation Commission v. Gourley*, A.C. 185, holding that the tax consequences should be taken into consideration. There has been an almost automatic repetition of the idea that too many complications would ensue and that too much conjectural testimony would be introduced, thus prolonging the trial.

The argument for modifying the majority rule is set forth by Chief Judge Lumbard, dissenting, in *McWeeney v. New York, New Haven & Hartford*, 282 F. 2d, 34 (2d Cir. 1960). The defendant, he says, is entitled to have the jury instructed so that it will make its calculations in the light of a proper understanding. Many jurors would believe that damage awards are taxable and would weigh the matter against the defendant. As to the "complications" stressed by Judge Friendly in the majority opinion, Judge Lumbard thinks they are not very troublesome. All that is needed--even as to the future--is to compute on the basis of net rather than gross. The future is conjectural anyhow, but taxes are certain to continue, and it's better to guess "the income variable after taxes instead of guessing the gross income before taxes." As to the past loss, it is certain that the plaintiff didn't lose his gross but only his net. Some of the earlier cases treated the matter casually, e.g., "Such deductions are too conjectural."¹³³

As to Judge Friendly's concession in the majority opinion that if the plaintiff's potential earnings were large, a failure to consider the tax factor would produce an improper result, Judge Lumbard's comment

¹³² *Floyd v. Fruit Industries, Inc.*, 136 A. 2d 918 (Conn. 1957); *O'Connor v. U.S.*, 269 F. 2d 578 (2d Cir. 1959); *Dempsey v. Thompson*, 251 S.W. 2d 42 (Mo. 1952); *Poirier v. Shireman*, 129 So. 2d 439 (Fla. App. 1961).

¹³³ *Frank, J.*, in *Stokes v. U.S.*, 144 F. 2d 82, at 87 (2d Cir. 1944).

is "... if the factor is relevant in any case it is relevant in every case."

In the majority opinion Judge Friendly said that there would have been no error in giving a requested instruction not to "add any sum... to the amount...on account of...taxes... [since] the amount awarded... is not taxable...", but that failure to do so was not reversible error. He also said that if a plaintiff had a high earnings potential, an award based on gross earnings would be excessive, and in those cases the court may properly give instructions. Where the line is to be drawn between those cases and other cases would be left, under Judge Friendly's view, to the discretion of the trial judge.

An article, "Personal Injury Recoveries and the Federal Income Tax Law," by Stanley C. Morris and Professor Robert J. Nordstrom,¹³⁴ discusses the arguments in favor of the present majority rule (complications, unnecessary to instruct, conjectural, confusing, would defeat intent of Congress). All of them are regarded as unrealistic and overdrawn. Fear is expressed that persistence in such absurdities endangers the whole system, because if courts and juries can't handle such a relatively easy matter as the nontaxability of verdicts, some other agencies may be found to do so. The tax matter in itself is not of great importance, but it adds to the accumulation of criticisms. This one is so easy to set straight that nonaction is unwise.¹³⁵

Our idea of a satisfactory solution is that the jury should be given a simple instruction to the effect that the damage award is not subject to income taxes. Surely the integrity of the judicial process will be improved by a straightforward statement of the truth. There is no need to go into complex and conjectural instructions as to the amount of the tax, past or present, and no need to open the door to speculative testimony. The chief purpose to be served is to make sure that the jury does not assume mistakenly that income taxes are actually as universal as they sometimes seem to be, must be paid on the award, and proceed to add something extra to the damages.

Amount of Recovery for Wrongful Death

Often the amount of recovery for wrongful death is so limited by statute as to leave the survivors inadequately provided for. We believe that this is a valid criticism, and we recommend remedial action.

Every state now has some sort of act giving a statutory remedy for wrongful death. With a few exceptions, the damages recoverable are limited

¹³⁴ 46 A.B.A.J. 274 (1960).

¹³⁵ Annot., 63 A.L.R. 2d 1378.

to pecuniary loss. But ten¹³⁶ states put statutory limits on the amount recoverable, perhaps fearing that juries are likely to be overgenerous when they are sympathetic. Some of the statutory amounts (seven at \$35,000 or less) are perhaps too low as maximums. But the wisdom of merely revising the limitations and stating some new and more realistic amounts is open to doubt. If damages in death cases should be measured by pecuniary loss, purely artificial limitations are difficult to justify.

We recommend that statutory limitations on damages in death cases, in those states in which recovery is measured by pecuniary loss, be removed.¹³⁷

Conclusion

Our conclusion is that the general rules for the ascertainment of damages in automobile accident cases reflect long and admirable efforts to award appropriate compensation to each person suffering damages at the hands of a culpable defendant, even though the circumstances may differ widely from case to case. Efforts to award damages on a formula are likely to cause serious inequities. The occasional malfunctioning of the present system can and should be corrected by the wise use of additurs and remittiturs. This performs a valuable moderating function without destroying the needed flexibility that the present system possesses.

Recommendations

Except with respect to the use of an instruction to the jury as to the fact that compensatory damages on account of personal injuries are not subject to income tax, we recommend that the general rules, including the collateral source rule, for the ascertainment of damages on an individualized basis be retained; that additurs or remittiturs be used in those instances in which the damages awarded are excessive or inadequate; that the jury be instructed of the fact that compensatory damages on account of torts or tort type rights are not subject to income tax; and that statutory limitations on damages in death cases, in those states in which the recovery is measured by pecuniary loss, be removed.

¹³⁶ Colorado, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, Oregon, Virginia, West Virginia and Wisconsin. From THE INSURANCE BAR 1968-69, Table X.

¹³⁷ The Committee has not considered the question whether a state that bases damages in wrongful death cases on the degree of culpability should change its laws. If the degree of culpability remains as a measure, a statutory limitation seems rational.

7. The Inequity of Awards Under the Present System

It is said that under the present system those who suffer minor injuries receive adequate and often excessive awards, and that these awards are relatively reliable. On the other hand, it is charged, persons seriously injured are compensated inadequately, and then only after controversy and delay, and sometimes they receive nothing.

This report discusses this criticism in three parts:

- (1) The uncompensated claimant (includes a discussion of the crossover medical proposal)
- (2) The overcompensated claimant (includes a discussion of the quick settlement option proposal)
- (3) The undercompensated seriously injured claimant.

A. The uncompensated claimant

A system that accepts as its basic premise that liability should be based on fault will, unless something is interposed, necessarily exhibit some instances in which the victim does not receive damages, either because the defendant was not guilty of negligence or because the claimant was himself at fault. These cases should be differentiated from those in which the reason for lack of compensation is the lack of a financially responsible defendant.

The question is whether, even after universal financial responsibility becomes a fact and the harsh doctrine of contributory negligence is changed, something ought to be done to compensate, in some degree, those who still are unable to recover. The problem will become substantially smaller if our other recommendations are followed, but it will not disappear totally.

Would it be wise to make some provision within the automobile reparations system to pay some benefit to every injured person, perhaps excluding only those whose own fault was flagrant or whose conduct is so reprehensible as to give rise to a public policy against making any payment chargeable in any way to the activity of motoring? To do so might be regarded as an expression of our compassion rather than our instinct for justice. But why not? The reasons against are (1) cost and (2) possible weakening of the deterrent effect of the tort law.

As to the latter, the deterrent effect of the tort concept will still be present if these victims receive much less than they would if they had a valid tort claim. As to cost, let us consider the matter further. Is it worth something to the motoring public to remove this particular criticism of the tort system and thus make the continuation of the system more secure?

How much will it cost? That, of course, depends on the size of the benefit. If the benefit is measured by the reasonable value of the necessary medical and hospital expense of the victim, subject to some conservatively selected limit, the cost should be small. Today medical payments rates are a function of bodily injury liability rates, *i.e.*, if the liability rate is \$80, the medical payments coverage costs \$9.00 at \$500 limits, \$11.00 for \$1,000 limits, using Massachusetts figures.

Today medical payments coverage is optional on a first-party basis -- *i.e.*, the insured buys the coverage primarily to benefit himself and his relatives. Those covered are the named insured and relatives while occupying an automobile or as a result of being struck by a highway vehicle, and any other person while occupying the owned automobile. The insured can collect under his own medical payments coverage and also may collect damages, including the value of medical services rendered to him, from a third-party tortfeasor.

If there is some additional cost involved for the new form of medical payments coverage to those who now voluntarily buy medical payments coverage (approximately 60 per cent of all policies now include medical payments coverage), it would be too small to matter. This form of medical payments coverage would reduce liability rates by a worthwhile degree.

We are suggesting for study a new form of medical payments coverage that would be on a crossover basis. This new form of medical payments coverage should be a mandatory part of the required liability insurance. As respects one car collisions, it would agree to pay the driver and the occupants of that car. In multi-car collision cases, the driver and occupants of car A would be paid by the coverage on cars B and C; the driver and occupants of car B would be paid by the coverage on A and C. A and C would contribute, etc. Any payment made under this coverage would be credited upon any settlement or judgment obtained by the one who received the payment. As now, the coverage would pay for reasonable expense for necessary medical, surgical, X-ray and dental services, including prosthetic devices, also necessary ambulance, hospital, professional nursing and funeral services, but such payments would be paid periodically. Collateral sources would be ignored, but if more than one automobile medical payments coverage was involved, they would contribute.

This concept constitutes, in effect, a modest system of benefits based on a strict liability concept but does so on a third-party basis within the form and framework of the tort system. The benefits do not duplicate benefits due as part of a tort recovery, as they do in many cases today, but rather constitute a prompt part payment on a periodic basis of whatever settlement may ultimately be arrived at.

This would place the duty to disburse the benefits in the hands of the insurance company that also has the duty to settle or defend the tort claim. It would contribute to the efficiency of the system. It

would facilitate prompt contact and start the negotiations on a good basis. It would put the medical payments coverage to work as a part of the tort system. Today it amounts to a separate accident and health coverage that pays benefits in addition to any tort damages recoverable. The added cost of including pedestrians who are members of non car-owning families and thus not covered today would be very small, possibly nearly nothing, since the medical payments coverage would, in the end, mean that much less to be paid under the liability coverage.

The payments need not be thought of as being for medical expenses. Indeed, for the large part of the population who have some other source that will pay the medical bills, it will amount to a benefit to be used as the recipient sees fit, to pay the grocery bill, for example. Calling the benefit a medical payments benefit is merely to say that the size of the benefit is measured by the medical bills.

It comports better with the tort system to write this coverage as part of the required liability policy and to place the disbursing function in the hands of the insurer of the prospective defendant. This modification of an existing coverage may enable a useful change to be made with a minimum of disruption. It seems to make better and more efficient use of a familiar device.

Use of such a coverage should end the criticism that the automobile reparations system callously allows some victims to go wholly uncompensated. It may be desirable to seek a feasible way of accomplishing this result. It would also be a worthwhile step toward the accomplishment of what some would view as the primary goal of any reparations system--the restoration of the victim to effective working and living. Professor Conard has stated, "Of all the coverages which merit enlargement, this seems to me to be the foremost one. The social benefits from lifting the lid from this coverage [medical payments], and making it compulsory--would be greater than any other change that I can imagine."¹³⁸

It seems to us that this proposal for the universal use of a modified form of medical payments coverage on a crossover basis is responsive to the demand that the automobile accident reparation system should not permit any injured person--except perhaps those flagrantly at fault--to go wholly uncompensated. Whether it is feasible, in the sense of gaining sufficiently wide acceptance to make it likely that it could be legislated, we are not now able to determine.

We recommend that "The Crossover Medical Payment Plan" be studied by interested persons, and particularly by the insurance industry, and that the objective results of the studies, including reasonably precise cost data and any alternative proposal for dealing with the problem of

¹³⁸ Justice in Injury Reparation, 52 JUDICATURE 108 (1968).

the uncompensated injured person on a third-party basis, be made available to the bar, to the legislatures and to the general public.

B. The Overcompensated Claimant

It is alleged that small cases tend to settle more readily and for higher multiples of "specials" (i.e., medical, hospital and loss of wages) than large cases. This fact is well known to everyone working in the system. It comes as no surprise to have it announced as part of the findings of the "new research."

Professor Conard has charted the phenomenon at page 441 in The University of Illinois Law Forum, Fall 1967, and comments ". . . these cases [referring to small ones] are often very generously compensated. If the injury victim collects damages at all, he is likely to collect them for several times the amount of his dollar loss. For instance, the accident costs him \$75.00 but he collects \$350 to cover his out-of-pocket loss plus his pain and suffering, plus any chance of future complications."¹³⁹

Again, quoting Professor Conard: "But none of these theories [he refers to the rule of contributory negligence and compensation for pain and suffering] would justify the distribution that exists, with the least significant losers regularly receiving the largest multiple of losses. . . ." ¹⁴⁰ He points to the Columbia study,¹⁴¹ the Michigan study and the Pennsylvania study¹⁴² as supporting the comment.

Professor Keeton points to the same fact and blames "expedient settling of small claims that probably are unjustified, but cannot readily be proved so" because of the uncertainties of ascertaining fault and "unsurmountable" difficulties of measuring the monetary value of pain and suffering.¹⁴³

Professor Rosenberg has stated part of the explanation in the course of discussing why small cases are not likely to persist to point

¹³⁹ 1967 U. ILL. L. F. at 441.

¹⁴⁰ 63 MICH. L. REV. 279, at 291 (1964).

¹⁴¹ REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (Columbia University Council for Research in the Social Sciences, 1932).

¹⁴² AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 179 (figure 5-3) and 279 (table 8-17); Morris & Paul, The Financial Impact of Automobile Accidents, 110 U. PA. L. REV. 913 (1962).

¹⁴³ KEETON & O'CONNELL 38.

of trial--in other words why they are disposed of more promptly than large cases: "When only small amounts are at stake, the pressures for ending the matter by compromise may find both sides more amenable, for in the small cases each party must bear in mind that it trial eventuates, even total victory may be Pyrrhic when the expenses have been counted." And again: "Cases with large potential are better prospects for trial than others because as a matter of dollars and sense a courtroom trial is an economically feasible way to dispose of them."¹⁴⁴

How shall we rid small case settlements of this artificial extra value claims adjusters and lawyers call "nuisance value"? That it ought to be done seems hardly open to argument. Unless a better purpose for the savings demands their use, it would bring about worthwhile savings in the cost of insurance, and thus relieve some of the pressures for drastic change.

One possible solution is to make quick, inexpensive but careful trial of such cases readily available. We do not know exactly how this can be done, and we are not sure that "try your case" is either a satisfactory or a feasible answer to many thousands of claimants with small injuries.

Another and more appealing approach is to invent something to alter the balance of bargaining power enough so that the insurance companies will have incentives to make quick settlements that omit the artificial, nuisance value but nevertheless do represent a fair value for claimants. For lack of a better name, we are calling the plan we have devised "The Quick Settlement Option."

It may be described as follows: As respects bodily injury cases in which the cost of medical and hospital services (excluding X-rays) does not exceed \$250, insurers are given an option, exercisable within four months of the date of accident, to limit their liability to the medical and hospital bills for services rendered within four months of the accident, plus (1) twice the amount of such bills (excluding for this multiplication X-ray bills), plus (2) 70 per cent of the value of the time lost subject to a maximum weekly payment of \$100.00; and (3) the reasonable cost of the damage to the claimant's property, not including loss of use. To exercise the option, the insurer must notify the claimant, in writing within four months of the accident that it assumes liability to pay the amounts described above.

The plan does not apply if (1) the total of the amounts described, other than property damage, exceeds \$1,000, (2) there is dismemberment or amputation, (3) there is permanent impairment of or limitation in the use of any part of the body, disfigurement of the face, neck, head, forearms or hands.

¹⁴⁴ Rosenberg & Sovern article, reprinted in DOLLARS, DELAY, AND THE AUTOMOBILE VICTIM at 108 and 105.

Within ten months of the accident the claimant may obtain a judicial review of the case. If the court finds fraud, misrepresentation, gross and shocking inadequacy of payment in relation to the loss sustained, or that the plan was not applicable to the case, the settlement is not binding and the claimant may pursue his tort remedy, subject only to crediting amounts paid.

To illustrate:

X sustains bruises and contusions. Total medical (no X-rays) is \$75. There are no scars and no permanent disability of any sort. He is out of work one week, losing his weekly pay of \$125. His car is damaged to the extent of \$100.

Within four months the company may notify X that it assumes liability for paying:

- (1) \$75 on account of medical
 - (2) \$150 on account of pain, suffering and inconvenience (twice the medical)
 - (3) \$87.50 on account of lost wages (70 per cent of \$125)
 - (4) \$100 on account of property damage
- \$412.50

If it does so, assuming no reason for judicial review, that is the end of the matter. There is no subrogation, no subtraction for collateral benefits. There is no liability under tort law.

Nothing interferes with settlements being made for more or less than the formula amounts, but it's hard to imagine any reason for the company settling within the four-month period for more. After the four-month period goes by without the option being exercised, the company could find itself paying more, a sort of a penalty for not acting promptly and more decisively. In cases in which no notice is given, i.e., the option is not exercised, the matter takes its usual course.

The value of the option, from the viewpoint of the insurance company, is to place a prompt and realistic ceiling on the settlement value of the small case with clear liability or the questionable liability case. From the viewpoint of the claimant, he will know promptly, within four months, whether the company intends to settle his case and for how much.

In a sense it's a one-way street, but the company is pushed into taking that street by the lure of a quick non-inflated settlement and is given sort of a reward for prompt action. As a result, the claimant's chances of getting a prompt non-inflated settlement are much improved. If this does not happen, his position is the same as it would be without the plan. Both sides gain something.

There are legal problems in some states and, of course, a legislative problem in every state.

Every plan that reduces insurance costs reduces benefits. This one reduces benefits by squeezing the artificial nuisance value out of a goodly number of small cases, and this is the right kind of a price to pay. It takes out of the system some payments that should not be in the system at all and does so neatly enough not to create a major disturbance. The problem of the overcompensated victim is at least partly solved.

The likely savings are informally and guardedly estimated to be in the general range of 10-12 per cent of the bodily injury liability premium. We also have some estimates of smaller savings. If the multiples were smaller, the savings would be larger. A smaller saving as to the property damage liability premium seems likely.

This is the fairest and least painful way to reduce insurance costs of which we have been able to conceive. It will work whether or not it is combined with other proposals. Assuming universal liability insurance as a foundation, it combines especially well with the proposal to place medical payments on a mandatory, crossover basis. The results of the two concepts in combination are (1) no wholly uncompensated victims; (2) not so many overcompensated victims; and (3) a probable net reduction in insurance costs.

The quick settlement option is responsive to the criticism that small cases tend to be settled more readily and for higher multiples of "specials" than large cases and that these settlements often involve paying an artificially high amount in order to dispose of the controversy.

We recommend that "The Quick Settlement Option Plan" be studied by interested persons, particularly by the insurance industry, and that the objective results of the studies, including reasonably precise cost data and any alternative proposal for dealing with the problem of the overcompensated injured person, be made available to the bar, the legislatures and the general public.

C. The Seriously Injured Undercompensated Claimant

Accepting for the purpose of this discussion the definition of "serious injury" as used in the Michigan study (hospitalization for three or more weeks, hospital and medical expense of \$500 or more, or death or some permanent physical impairment), these cases apparently constitute about 12 per cent of all automobile caused injuries that result in some economic loss.¹⁴⁵

¹⁴⁵ AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 160, figure 5-1. These cases were 10,300 in the Michigan group of 86,100.

Of course, the percentage drops sharply as the degree of seriousness increases. But even so, these are the horrifying cases. The worse the case, in terms of loss, the greater the statistical chance of receiving inadequate reparation. There are various reasons. For one thing, the really bad case is likely to produce a loss far in excess of the policy limits and the financial resources of the defendant combined.

Other than inducing motorists to purchase very high limits of liability, there is no easy answer to the problem of these rare but terrible cases. They are terrible from the standpoint of the defendant also, and perhaps there should be some way to relieve the defendant of personal liability if he has purchased enough insurance to take care of all but the cases at the extreme upper end of the spectrum. Perhaps, as Professor Conard has concluded, the ultimate answer to the problem of lifelong destitution for the permanent total case is to let social security take over at the point the benefits from other systems have been exhausted.¹⁴⁶

Morris and Paul propose a plan called "supplementary compensation in economic disaster cases."¹⁴⁷ The cases they propose to deal with are those with unreimbursed medical expenses and earnings losses exceeding \$800. A fund would be created--either a tax-supported state fund or a private fund made up by insurers. The fund would reimburse eligible claimants for 85 per cent of their covered medical expense and would also pay death and disability benefits. It would have subrogation rights. To help defray the cost of these benefits, they propose to eliminate some of the excess value associated with small claims. They would do this by, among other things, eliminating recovery for pain and suffering in cases where the tangible losses were under \$800.

Because a total solution is not immediately at hand is no reason for total inaction. Several things can be done to ease the problem, and these have been recommended elsewhere in this report. If there is compulsory insurance, combined with mandatory uninsured motorist coverage, as we have recommended, the victim, except in the one car cases, always will have at least a partially financially responsible defendant.

In those states which, pursuant to our recommendation, increase the required limits of liability, his chances of an adequate award are improved. If the victim is killed, his representative, if our recommendation is followed, will not be confronted with an arbitrary statu-

¹⁴⁶ Live and Let Live: Justice in Injury Reparation, supra note ----, at 105 and 108.

¹⁴⁷ Morris & Paul, supra note 141.

tory limit upon the recovery. If the contributory negligence doctrine is replaced by the doctrine of comparative negligence, his chance of being denied any recovery because of his own fault is less than it has been in the past.

He can be sure of at least some of his medical expenses being paid if the crossover mandatory medical payments coverage concept is adopted. He can retain his collateral source benefits along with his tort settlement. And if our recommendations aimed at relieving delay in the courts are followed, we believe that he will not be under pressure, by reason of the prospect of a long delay pending trial, to accept an inadequate settlement.

8. COSTS

A. Insurance Costs

B. Costs of Legal Services

The allegations are that insurance costs are too high, that injured people receive too small a proportion of the premium dollar, that the costs of administering the present system are too high, that the fees paid by injured persons to their attorneys are excessive and that the usual arrangement, the contingent fee, leads to undesirable practices.

A. Insurance Costs

It is very difficult to know precisely what people mean when they say that insurance costs are too high. If they mean to say that the insurance companies charge more than they should, one can give a short answer to this criticism by pointing out that every state regulates by one means or another the rates that may be charged for automobile insurance. Every state regulatory law forbids rates that are excessive or unfairly discriminatory. These laws have as one of their purposes the protection of insurance buyers against rates that are too high.

Insurance companies compete among themselves. Most states allow downward "deviations" and the right to file independently of the rating bureau. Many companies, after establishing that they can safely do so, offer competitive rates.

If people mean by the rate criticism that the cost of insurance has gone up more than some other items that go to make up the family budget, they are right. The chief reason for this is that the value of a claim for damages reflects the costs of its principal ingredients. Those ingredients are: cost of medical services, hospital services, loss of wages, cost of repairing damaged automobiles and, that more difficult to measure item, the value of pain and suffering.

The cost of an average property damage claim went up 46 per cent from 1958 to 1966. The cost of an average bodily injury claim went up 31 per cent during the same period (source: Journal of Insurance Information, "An Analysis of an Explosive Situation"). This source also states that between 1956 and 1966 countrywide average costs of medical care rose 39.1 per cent, hospital care 92 per cent, automobile repair costs 21 per cent, and that the cost of living went up 19.4 per cent during the same period.

In New Jersey, the average daily hospital charge (bed accommodations) went from \$26.80 in 1961 to \$34.10 in 1965. (Source: American Hospital Association.) Hospital costs have generally gone up more rapidly than other costs. During the same period in New Jersey the number of deaths and injuries from automobile accidents went up 46.3 per cent from 80,836 in 1961 to 118,255 in 1965 (per New Jersey Division of Motor Vehicles), but car registrations were up only 18 per cent.

We are told that the consumer price index shows an increase in automobile insurance rates of 45 per cent since 1957-1959 while the whole index rose only 18 per cent. (Statement of Consumer Federation of America.) But we are also informed that from 1956 to 1967 the cost of hospital care countrywide jumped close to 100 per cent, and physicians' fees 43 per cent. (Source: American Mutual Insurance Alliance.)

It is apparent that in the absence of some change that would prevent people from recovering their full damages, or some downward change in the cost of selling and servicing insurance, insurance cost increases have been inescapable. It is also apparent that if damages on account of pain and suffering had formed no part of the system and if damage awards had been limited to recovery of hospital and medical costs and loss of wages, there would still have been large increases in the cost of insurance.

The American Mutual Insurance Alliance informs us that the wages of factory production workers rose 130 per cent from 1947 to 1967, during which period the cost of basic limits (10/20/5) liability insurance rose 121 per cent. At least this group of wage earners are spending a lower number of hours earning enough to pay for this insurance than they did 20 years ago. It is said that in 1947 the typical American family spent 1.33 per cent of its income to buy 10/20/5 automobile liability coverage, but that 20 years later in 1967, the figure had dropped to 1.14 per cent. (Source: American Mutual Insurance Alliance.)

Costs by Rating Territories

Automobile insurance costs vary widely state by state and from one part of a state to another, depending chiefly on the number of claims being caused by the accidents in which the residents of the rating territory were involved. The range is from \$33.01 (for limits of \$10,000/\$20,000 for bodily injury liability and \$5,000 for property damage liability) in South Dakota to \$129.92 in Massachusetts. The

United States average is given as \$79.64.¹⁴⁸ These figures do not include the cost of physical damage insurance--fire, theft, collision. In certain areas liability rates have come down, reflecting successful results of efforts to improve highway safety.

While it may be small comfort to compare these average costs with the cost of other items that also have gone up in price, it may help to keep a reasonable perspective to bear in mind that in South Dakota insurance costs are less than what most people spend for newspapers, that the countrywide average is less than the cost of a case of Scotch whisky, and that even in the high-cost states insurance costs less per day than it does to park your car in a downtown area. The pack-a-day cigarette smoker probably spends more in a year for his cigarettes ($.35 \times 365 = \$127.25$) than he does for basic limits automobile liability insurance in all but one state.

It's easy to understand that people are reluctant to spend money for intangible things like liability insurance. When such a purchase is persuaded by force of law (as under the numerous financial responsibility laws) or even compelled, resentments are likely to arise. These resentments seem almost as likely to develop in the states where average insurance costs are relatively low as they are in the higher cost states. It seems to us that there is a need for constant reminders of the value and function of liability insurance and that insurance costs can be reduced by more effective traffic safety activities on the local level.

Proportion of the Premium Dollar Paid to or for Injured Persons

In order to consider whether injured persons receive too small a proportion of the dollars spent for insurance, it is important to bear in mind that the present system is not a simple mechanism for collecting dollars from many people and distributing those dollars to certain other people according to a predetermined formula using objective standards (such as wages, age, sex), as in the social security system.

What we call the "automobile accident reparations system" is quite different. Its basic premise is that it is desirable to differentiate the guilty from the innocent, those at fault from those not at fault. As respects automobile-caused injuries, this is done by applying a test which reflects the judgment of society as to what sort of conduct is socially desirable. As every lawyer knows, the standard by which the conduct is judged is the way the hypothetical person who personifies society's ideal of reasonable behavior--the reasonable man of ordinary prudence--would act under similar circumstances.

¹⁴⁸ UNITED STATES NEWS & WORLD REPORT, July 8, 1968, which gives its source as the Insurance Rating Board.

It does not matter much whether one views this concept as being an expression of public policy, a matter of morals, or as merely making a choice as to where the burden of paying damages for the injury should rest.

Most of the members of the current generation of practicing lawyers were taught that the moral aspect of the conduct in question was of some legal significance. There are, we believe, deep-rooted feelings that there is and should be a connection between moral blameworthiness and liability and that liability should not be imposed without fault. To be sure, fault tends to become equated with social rather than personal morality or with "public policy," but there is an underlying moral basis to the law of torts as it applies to automobile cases. It has too much value for society to be lightly repudiated.

Thus we accept the value of and necessity for going to a considerable amount of trouble to test conduct to identify those at fault. We accept the necessity for and the value of a careful effort to determine damages in each case. We accept the value of and need to avoid unfair discrimination in insurance rates. If all this means that costs comparisons between our system and other systems, which do not attempt to make these differentiations, will show that our system costs more to administer, this is a price which, according to the scale of values accepted by the Committee, society should be willing to pay.

Some confusion exists as to what proportion of the premium dollar is used to pay losses and what part goes for other purposes. On the basis of the way the automobile liability rates used in New Jersey by the rating bureau (non-participating, agency, stock companies) are made, the following table illustrates how (in theory) the premium dollar is used:

64.1¢	for losses and loss adjustment expenses
19.0¢	allowance for production costs
6.5¢	for company operating expense
5.4¢	for state premium tax, licenses and fees
5.0¢	for underwriting profit and contingencies

Frequently the amounts actually used for losses and loss adjustment expenses will substantially exceed the theoretical allowance.

Some companies and certain groups of companies show a somewhat different picture, especially in actual results instead of a theoretical breakdown.

This statement furnished us by the Insurance Company of North America included an exhibit of underwriting results for five years (1962-1966) for automobile bodily injury liability, as follows:

Pure losses	59.8)	
Loss adjustment expense	12.4)	72.1
Acquisition costs		19.0
General expense		7.4
Taxes and fees		4.0
Total loss and expense ratio		102.5

In the brochure furnished us by the National Association of Independent Insurers it is stated that the present system pays in benefits (presumably meaning losses and loss adjustment expenses) 75¢ out of every premium dollar. An exhibit is furnished, based on the loss and expense ratios (1966) shown in the report of the New York Insurance Department, as follows:

1. Loss payments made or to be made	63.2X)	
2. Claims adjustment expense	13.4X)	76.6
3. Commissions and brokerage	12.9#)	
4. Other sales expense	5.7X)	26.7
5. General expense	5.0X)	
6. Taxes and fees	3.1#)	
Total loss and expense ratio		103.3

X = of earned premium
= of written premium

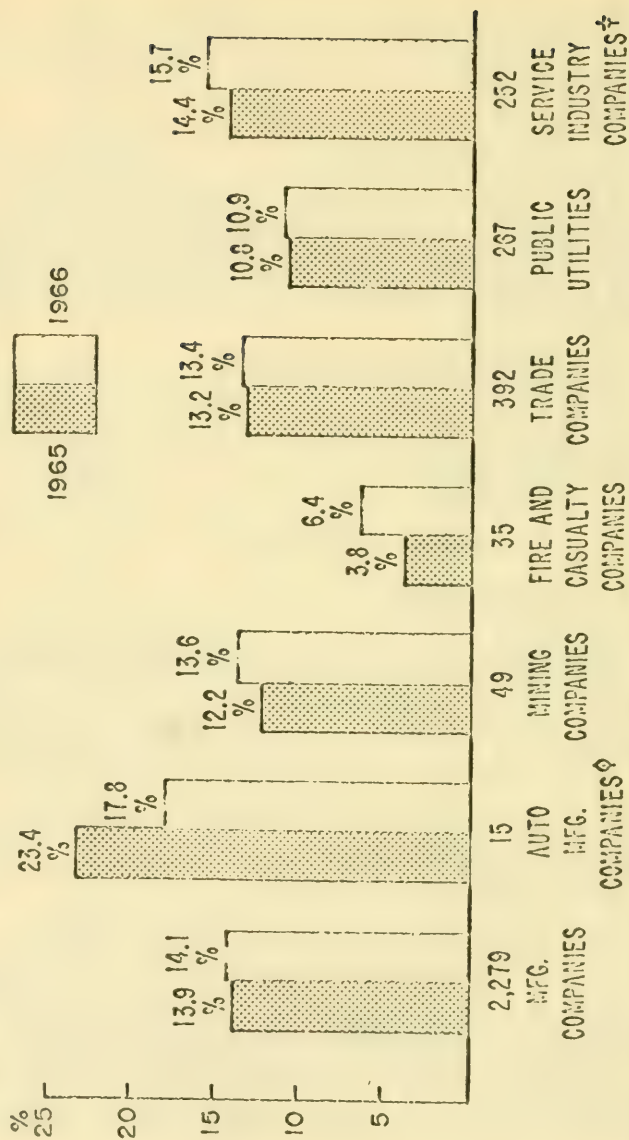
There is an authoritative statement on ratemaking procedures for automobile liability insurance in the article by Philipp K. Stern in the 1965 Proceedings of the Casualty Actuarial Society (page 139). There is a detailed breakdown of the premium dollar for private passenger automobile bodily injury liability in Richard J. Wolfrum's remarks in 1967 University of Illinois Law Forum (page 538).

The provision for profit and contingencies is designed to absorb inadequacies from the other provisions being too small, to contribute to surplus to assure the company's ability to carry out its obligations, and to provide funds for future growth.

Costs Should Be Related to Services Performed

When considering the question of relative costs of various systems, it is well to bear in mind the differences between the systems in respect to the services they undertake to perform. The tort system makes many decisions that require skillful evaluation as well as the investigation, of facts. Who is telling the truth? Who was at fault? What is the value of pain and suffering? Comparisons of the cost of performing such functions with the cost of performing easier tasks are of little value in determining the reasonableness of the respective costs.

NET INCOME OF LEADING CORPORATIONS GROUPED BY INDUSTRY, 1965 AND 1966,* AS PERCENT RETURN ON NET WORTH



* SOURCE: FIRST NATIONAL CITY BANK OF NEW YORK
^Q INCLUDED ALSO IN 2,279 MANUFACTURING COMPANIES
[†] CONSTRUCTION, AMUSEMENTS, RESTAURANTS, HOTELS, ETC.

To compare the cost of the tort system with the cost of a social security system, which does not pay taxes, need not make a profit, need not provide funds for growth, has no sales expense, does not underwrite, does not do loss prevention work, does not determine questions of negligence, does not attempt to make benefits commensurate with the damage sustained, etc., does not help us to form a judgment as to whether the respective prices fairly value the services rendered or as to whether significant waste, extravagance or excessive profits are involved.

An examination of all aspects of insurance pricing is beyond the scope of this report. But it may be of interest to note that an independent research organization (Arthur D. Little, Inc.) reported as recently as November, 1967, that "the overall returns earned by the property and casualty industry have been significantly below returns earned by other industries having similar and even lower risks" and to note the attached chart showing the "Net Income of Leading Corporations Grouped by Industry, 1965 and 1966, As Percent Return on Net Worth." This is not to say that we have any conviction that new economies and worthwhile improvement in all these areas are not attainable.

We recommend further and persistent efforts to find better and less costly ways of providing and distributing the automobile insurance product and of performing all other automobile insurance services with optimum speed and economy.

B. Costs of Legal Services

1. The Contingent Fee^{148a}

In the United States the usual method of charging for legal services rendered to a claimant in an automobile accident case is to agree upon a contingent fee contract whereby the lawyer is paid only if some recovery is achieved through the lawyer's efforts. The amount of the fee is proportional to the amount of the recovery and is designed to be greater than that reached by other methods of service evaluation to offset the absence of fee in those cases in which the claimant does not succeed in securing a settlement or judgment.^{148b}

The percentage used to determine the size of the fee varies. In urban areas one-third is a common rate, often lower (25 per cent) if

^{148a} F.B. MacKinnon defines a contingent fee as follows: ". . . a fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyers efforts. . . if no recovery is obtained the lawyer is not entitled to a fee". Contingent Fees for Legal Services, p. 3.

^{148b} MacKinnon (supra) notes, p. 28 that to the extent the lawyer plans to charge more if he wins other fees may be thought of as being contingent as to size.

the case is settled, often higher (40 per cent) if an appeal is involved. It is not uncommon for the percentage to be graduated, i.e., higher if the amount involved is small, lower if a large amount is involved.

Contingent fee arrangements are not confined to automobile cases. Lawyers who undertake to collect overdue accounts are usually paid on a contingent basis. The Commercial Law League has a recommended schedule of fees--18 per cent on the first \$500 graduating downward to 10 per cent on amounts over \$1,000. In workmen's compensation practice it is usual for the statute to provide that fees may be allowed only on that part of the award which can be regarded as attributable to the effort of the lawyer. In many states the percentage rate is applied only to the increase obtained above a settlement offer and the percentage usually declines as the amount of the award increases.^{148c} In tax cases the fee is often based on the savings obtained because of the lawyer's work. In minority stockholders' suits the lawyer usually receives nothing unless the suit is successful. In suits for damages under antitrust laws the fee may not wholly depend upon success but most of it is likely to come from the damages awarded. In condemnation proceedings the fee usually is measured, at least in part, by the size of the increase in the final figure over the offer.

In spite of its widespread use in the United States, the contingent fee often is criticised. In most of the countries of the world the practice is forbidden.

This is not an appropriate place to delve into the historical, economic and social reasons for this marked difference in attitude toward such an important matter as how, and how much, a client should be charged for professional services. The American Bar Association has considered the question of contingent fees repeatedly and although the attitude has varied a little from time to time, there has never been an official position condemning the practice.

The attitude of the American Bar Association, as reflected in the Canons of Professional Ethics, has been as follows: From 1908 to 1933 Canon 13 read: "Contingent fees where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges." This wording involved a change from a rejected proposed draft that read: "Contingent fees may be contracted for, but they lead to abuses and should be under the supervision of the court."

It seems reasonable to suppose that the change in the first part of the statement was made in light of the fact that at that time both Maine and Massachusetts regarded the contingent fee (if a share of the

^{148c} See MacKinnon (supra) p. 26 and p. 119.

recovery) as illegal, and also because the original draft would seem to permit a contingent fee even in a divorce case, a criminal case or for lobbying.

But the change from "they lead to abuses and should be under the supervision of the court" to "should be under the supervision of the court, in order that clients may be protected from unjust charges" can reflect only an unwillingness to go so far as to assert that such fees lead to abuses and a decision to rest the case for court supervision on the narrower base of protection against unjust charges.

The Canon was amended in 1933 to read, as it does now: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of the court, as to its reasonableness."

The proposed new Code of Professional Responsibility discusses contingent fee arrangements in Canon 2, "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." In the statement of "Ethical Considerations" the paragraph in point is #20. It starts with a sentence recognizing that contingent fees in civil cases are commonly accepted in the United States in proceedings to enforce claims. Then there is a sentence recognizing two historical bases of this acceptance: (1) because they provide a practical way for the claimant to obtain a competent lawyer, and (2) because success produces a res from which the fee can be paid.

Then comes the key sentence: "Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement."

Whatever the full sweep of the implications from the particular words chosen (the emphasis in the quoted language is supplied) may turn out to be, it is certainly clear that contingent fee arrangements are not condemned by the newly proposed Canon.

We do not know what brought about the decision to omit the clauses of the present canon, i.e., "should be reasonable under all the circumstances of the case," and "should always be subject to the supervision of the court as to reasonableness." We assume that the drafters felt that several other provisions of the newly proposed code and various public policy considerations supply an ample base to support present systems of supervision of contingent fees and supply the foundation on which further such systems could be erected, should they be needed. For example:

"A lawyer should not charge more than a reasonable fee. . ." (§ 17)

"The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary rules" (§ 18)

". . . every person in our society should have ready access to the independent professional judgment of a lawyer of competency and integrity" (§ 1)

"The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or other relevant factors" (§ 2)

"A lawyer shall not request a person. . . to recommend employment. . . of himself. . ." (Disciplinary Rules 2-101 (C))

"A lawyer shall not acquire a proprietary interest in the cause of action. . . except he may. . . contract. . . for a reasonable contingent fee. . ." (Disciplinary Rules 6-102 (A))

"A lawyer shall not advance. . . financial assistance to his client for expenses relating to such litigation or for medical or living expenses during the period of such representation, except that he may advance. . . the payment of court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence" (Disciplinary Rules 6-102 (B))

". . . A lawyer shall not file a suit. . . conduct a defense. . . delay a trial. . . when he knows. . . such action would serve merely to harass. . . knowingly advance a claim or defense that is not warranted. . . knowingly use perjured testimony or false evidence. . . make a false statement of law or fact, participate in the creation. . . of evidence when he knows. . . that the evidence is false. . ." (Disciplinary Rules 7-102)

"A lawyer shall not divide a fee. . . with another lawyer. . . unless. . . the division is made in proportion to the services performed and responsibility assumed by each. . ." (Disciplinary Rules 2-107 (A))

It would seem that these provisions, plus the power of the courts to prevent improper conduct on the part of members of the bar, furnish an ample foundation for any reasonable system of regulation or supervision that may be needed to cope with any abuses that may develop in connection with contingent fees.

Those who are critical of the contingent fee assert that it tends to foster (1) excessive fees and overreaching of clients as to what the fee should be, (2) self solicitation of representation, (3) improper division of fees in referral cases, and (4) impairment of the

objectivity and independence of the lawyer, resulting in the bringing of questionable suits, a reluctance to accept settlement offers in the hope of a larger fee if the case is tried, the use of improper or overzealous negotiations and over-dramatic trial tactics.

Such practices are not to be condoned even if the value of the arrangement in increasing the availability of legal services and its economic importance to members of the bar are fully established. The crux of the question is whether the contingent fee does in fact underlie such practices if and when they do occur, and that question leads back to the question whether the fees actually charged are excessive in fact, all things considered. If the contingent fees are not excessive in fact, it would seem that the link to the alleged abuses is tenuous at best.

It is not simple to evaluate the size of a fee in a personal injury suit in terms of reasonableness. What is the correct principle to apply? It does not seem rational to draw conclusions from the fact that the fee in a particular case may be well in excess of what would be received at a reasonable hourly rate, once we accept the idea that it is not improper to "overcharge" in some cases so that there can be undercharges--i.e., no charge--in other cases. This "overcharge-undercharge" system has not seemed to be too much of a price to pay for the maintenance of a system of making legal services in automobile claims cases available to all who need them.

There is however a serious question as to whether the rational support for such a system can continue to rest largely upon the "contingency" aspect of the matter because, as matters have developed and as they may develop in the near future to an even greater degree, the risk of failure--i.e., no recovery and no fee--is becoming smaller. But this does not necessarily mean that a satisfactory justification does not exist, merely that other grounds should be examined more closely.

Probably more enduring justification for the "overcharge-undercharge" system is found in the fact that most lawyers find it necessary to handle a mix of automobile accident cases in which are a large proportion of small cases, some medium-sized cases and a few large cases. The mix also involves cases settled without suit, after suit but before trial, during trial, and some that require a full trial, perhaps followed by an appeal. There are also cases disposed of promptly, regardless of which method of disposition is involved, and those that are in the office for a long time.

F.B. MacKinnon¹⁴⁹ made an analysis to determine whether the usual contingent fee in the average case closed without filing suit constitutes adequate compensation for the lawyer, if it is assumed that the

¹⁴⁹ MAC KINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964).

stated fees in a particular minimum fee schedule (Illinois) amount to adequate compensation (\$25.00 per hour). He found that in cases closed without filing suit the average recovery was \$912, and that these cases produced an average fee of \$356. The rate of closing of cases without recovery was 2½%. Taking this into account, the effective fee per case dropped to \$347 (38%). This is the amount that would be earned by 14 hours work at \$25 ($14 \times 25 = 350$). Almost half of all recoveries were found to be below \$600 (with and without suit). In these cases the contingent fee would average \$246 (adjusted to reflect the failures), the equivalent of 10 hours work at \$25 per hour. One quarter of all recoveries (with and without suit) are below \$300, for an average fee of \$123, the equivalent of 5 hours work.

Mackinnon concluded that likely the fees for the small cases (under \$300) were not excessive. He also concluded that "--as the size of the recovery increases greatly the increase in the fee becomes excessive for the amount of additional work performed," the work does not increase proportionately and that in the larger cases the fee becomes excessive. Apparently he had no data as to the actual number of hours of work various categories of cases required.

Cases that go to trial present an interesting picture. Of suits reaching trial (in New York), 47 per cent yield a recovery not over \$1000, 22 per cent between \$1001 and \$3000, and 14 per cent over \$10,000. Since the average length of a complete jury trial is 17.4 hours (4¼ days) and the average effective fee for cases brought to trial is \$1,285, it seems clear enough that, after taking into account the time spent prior to trial, the lawyer would be better paid for these cases if he were working for a flat \$250 per day ($250 \times 4\frac{1}{4} = 1,060$).

A tentative conclusion that the mix, more than the contingency of the recovery, supports the "overcharge - undercharge" system seems warranted. But until cost data showing hours of work required to handle various categories of cases can be collected and analyzed, conclusions that the contingent fee system does not produce excessive earnings for average lawyers who handle a moderate volume of such work must be somewhat guarded. On that basis we accept Mackinnon's conclusion ". . . . when the mass of cases is taken as a whole, the idea of using overcharges to some clients to offset undercharges to others does not seem an unfair way to support a system of providing competent legal services to clients who need them, assuming there is no feasible alternate system."¹⁵⁰

That no feasible alternative system for general use has yet emerged is not to say that one cannot be devised. Changing attitudes toward "institutionalized legal services" may be giving a signal that such concepts will become more significant in the not very distant fu-

¹⁵⁰ Id. at 182.

ture.¹⁵¹ As of now no such alternative system is in general use in the United States.

There are allegations that the contingent fee breeds unethical and unprofessional conduct. It is a fact that such abuses have existed at certain times and places and that the contingent fee has existed as the dominant method of charging fees in accident cases in those places where the abuses have been found. But to prove that the abuse was caused by the fact that the fee was contingent, or that the abuses were caused by the large amounts of money involved in handling a large number of accident cases at the usual rates, is another matter. Probably the connection is simply not susceptible of actual proof. But the active trial bar and the judges of the active trial courts are almost certain to have a good idea of what is going on in particular places. It seems to us that these segments of the profession owe a duty to the profession as a whole to be alert and on guard to prevent abuses and to move to bring about appropriate punishment of those involved in wrongful conduct.

Being alert and on guard is not of much practical value unless detailed facts are available. We don't know how those facts can be recorded and made available short of some such system as has been in use in New York Supreme Court Appellate Division (1st Department) since 1957, under which both the contingent fee contract itself and a closing statement are filed, and under which an effort is made to define the size of fee regarded as reasonable. We do not suggest a universal use of the New York system or an uncritical acceptance of the New York schedules. Local conditions may be such that there is no significant amount of unethical conduct, and the schedules may be too unsophisti-

¹⁵¹ *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967).

cated or otherwise unsuitable for use in other places.^{151a}

Our conclusions and recommendations are:

1. The use of the contingent fee system is a valuable method of making legal services available to a person who has a legitimate claim but insufficient means to pay or retain an attorney and such use should continue.

2. Courts, upon whom the duty of supervising our profession rests, should assume where necessary or advisable, exclusive responsibility--

(a) in the examination, scheduling and supervision of contingent fees and

(b) in the disciplining of attorneys who have violated the rules or have acted unprofessionally.

151a In 1964 the American Bar Foundation undertook a study of the contingent fee question which resulted in the publication of a book entitled "Contingent Fees for Legal Services--A study of professional economics and responsibilities" by F.B. MacKinnon, Esquire.

The book provides the information necessary for evaluating the practice and proposals for its change. It includes material on the historical, professional and economic context within which the practice of charging contingent fees developed.

It also includes sample forms of contingent fee contracts and a copy of the special rules regulating conduct of attorneys of the First and Second Judicial Departments of the State of New York requiring attorneys who accept retainers on a contingent fee basis to sign and file a written statement thereof containing the information set forth in the form and also requiring closing statements, in prescribed form, to be filed.

These rules also contain a schedule of fees on a sliding scale basis and an alternative schedule on a fixed percentage basis. Rule 14 (Contingent Fees) of the Supreme Judicial Court of Massachusetts is also set forth.

In 1966, The Defense Research Institute published a 31 page monograph on the subject. It was originally printed in the Insurance Counsel Journal, Volume 33, No. 2, April 1966.

The monograph sets forth the history of the subject, the criticisms, a survey of existing regulation and a number of recommendations.

(c) Courts should consider the need and advisability of requiring lawyers to file information on contingent fees. Such requirements should be promulgated in the light of local conditions. Among the requirements that should be considered are the filing of information on all contingent fee contracts and arrangements (oral or written) with the courts and the filing of closing statements in all cases.

(d) Courts should, where appropriate, promulgate a contingent fee schedule. In so doing, there should be considered such factors as whether the case is settled before, during or after the trial; whether a case is appealed; the probable amount of time and effort expended by the lawyer; the complexity of the case; the ingenuity exercised; the risk involved; and what, in the overall, should constitute a fair and reasonable fee for services performed.

(e) Courts should provide--

- (1) appropriate means and methods for clients to file complaints and
- (2) procedures for the consideration and determination of such complaints.

(f) If a lawyer pays or a forwarding lawyer is paid a referral fee, the amount should be fair and reasonable and have direct relationship to the value of the services performed. Any such payment should be subject to the review of and determination of the Court.

2. Fees for the defense of cases

Fees charged for the defense of cases are not contingent fees. The usual arrangement is for an hourly rate, or specified rates for particular services, or some combination of those methods.

The clients usually are insurance companies. They are experienced in their relations with the defense bar. Most of them are knowledgeable about prevailing rates for legal services and about the relative skill and standing of individual lawyers and firms. It seems unlikely that any substantial over-reaching could occur on other than an occasional basis. Nevertheless, the question of whether reasonable defense fees are being charged is of some public importance because of the public interest in the regulation of insurance and the universal concern that rates for automobile insurance not be excessive.

The portion of the premium dollar spent for "claims adjustment expense" is, normally, about 12-13 per cent. This includes the cost of investigating and defending claims and suits. The part that relates to and includes the legal costs of defense is called "allocated claims

expense," and it amounts to 4 to 6 per cent, usually a bit less than half of the 12-13 per cent. Included are, in addition to fees for lawyers respecting matters in suit, the costs of medical examinations made to determine the extent of the companies' liability, the fees of expert witnesses, the costs of autopsies, etc. Probably lawyers' fees account for approximately 85 per cent of the 4-6 per cent, somewhere around 3.4-5.1 per cent of the premium dollar, varying by company.

The Committee is not aware of any viewpoint or criticism that these amounts are unreasonable for the services received. The Committee is aware of the use of attorneys employed on a salary basis by insurance companies. The method is designed to obtain legal services at less cost to the company than may be involved in referring cases to outside counsel. This matter has been under consideration by the National Conference of Lawyers and Liability Insurers and insofar as it affects the proper administration of automobile accident litigation should be the subject of further inquiry by this Committee.^{151a} The Defense Research Institute, Inc., concerned with the increasing cost of litigation, has maintained a lively interest in the subject of "Efficient Use of The Legal Effort in Insurance Litigation" and published a reprint of a committee report under that title.¹⁵²

Many of the pressures which the contingent fee allegedly generates are simply not present when the lawyer is paid regardless of the outcome of the case. This is not to say that defense lawyers are never guilty of keeping a case open unnecessarily long to collect a fee for a court appearance, of taking unnecessary depositions, of the making of unnecessary motions, of applying the "full treatment" to the purely routine case, etc. If such practices should, in any particular place, reach the point where they are contributing significantly to delay in the settlement of or the trial of cases, or if they are adding significantly to the costs of defense, they should be brought under control by some appropriate method which might require the filing of closing statements by defense lawyers. We are not aware of any investigations or of any writings by knowledgeable persons suggesting the existence on a significant scale of unethical or unprofessional conduct respecting fees for the conduct of the defense of automobile accident cases.

9. Gap Problems

The criticism is that too often a judgment for damages sustained in an automobile accident is not fully collectible. When this occurs, a gap problem exists. We regard this as a valid criticism and recommend specific remedial action.

^{151a} But see the opinion of the Supreme Court of Fla., Mar. 12, 1969, Case no. 38099, 22050, 2d #6 In Re Proposed Addition to the Additional Rules Governing the Conduct of Attorneys in Fla. "The moral considerations should not be exploited so as to develop a double standard of ethics for salaried and non-salaried lawyers."

¹⁵² 30 Ins. Counsel J. (1963).

There are three gaps:

--(A) The insurance gap, which occurs when the defendant is uninsured and lacks personal financial resources.

--(B) The insolvency gap, which occurs when the defendant's insurer is insolvent.

--(C) The limits gap, which occurs when the limits of the defendant's insurance are insufficient to pay the judgment.

A. The Insurance Gap

Of the three gaps enumerated, the largest is the insurance gap. We think that a solution of this particular problem is overdue.

A slow evolutionary process has occurred. Beginning in about 1925, probably as a response to the prospect of the enactment of compulsory insurance laws, the states began to enact financial responsibility laws that allowed the driver his "first bite." These laws did not apply to the violation-free, accident-free driver. Only after he had been in an accident, perhaps a serious traffic law violation, was he required to show evidence of financial responsibility, usually in the form of liability insurance, before he could continue to operate his car. His victim usually went uncompensated.

Later the "security and proof" financial responsibility laws were devised. Under these the accident-involved driver was commanded to post security in the form of cash to pay for the accident and to give proof in the form of insurance of his future financial responsibility. But if he had no money, he couldn't post the cash and generally the duration of the future proof was limited to three years.

These laws constituted a major advance. Under their persuasive effect many people did assure their financial responsibility even before becoming involved in an accident. The percentage of insurance, i.e., the proportion of car owners with insurance, has gone up from around 30 per cent before their adoption to the present level, state by state, from a low of 60-65 per cent to a high of about 90 per cent.

Although the statistics are slippery, it is likely that in 15 states the percentage of insurance is not over 80 per cent, nine states probably show percentages under 70 per cent. Not more than 17 states would prove to have as many as 90 per cent of their drivers insured. Overall, there must be some 13 million automobiles without insurance protection.

This does not mean that all of the victims of these uninsured drivers confront a financial gap. The uninsured motorist coverage has gone far to reduce its size. But there still is a gap of substantial

size,¹⁵³ and statistics are not much comfort to the victim if the gap exists in his case.

We believe that it ought to be closed without further delay. The obvious and straightforward way to do it is to enact laws that require every car owner to insure his liability and to continue such insurance in effect so long as he owns an automobile.¹⁵⁴

Massachusetts was the first state to enact such a law. It became effective in 1927. New York was next, but not until 1956, then North Carolina in 1957.

For reasons too complicated to set forth and evaluate here, many insurance companies opposed the enactment of compulsory insurance laws. This opposition accounts for the slowness of the states to move. Nevertheless, the movement toward required universal financial responsibility has not ceased. Few persons could be found who would argue against its desirability, only about the means to be used to achieve the goal.

Broadly there are three courses of action available.

(1) To create an unsatisfied judgment fund using enforced contributions from uninsured car owners and from insured car owners, directly and indirectly via assessments on insurance companies.

The Canadian provinces, North Dakota, New Jersey, Maryland and Michigan have followed this route. In New Jersey and Maryland the problems have been serious. There the funds have been in dubious financial condition. As the fee from the uninsured goes up, so does the evasion rate, and the administrators have been forced to probe for the rate that produces the optimum return even though it may be lower than the formula provides. Claims procedures become tough and cumbersome if the fund is to be protected. Drivers who don't reimburse the fund are not being ruled off the road, as was contemplated. Instead, often they are permitted to make installment pay agreements, sometimes at very low amounts per week. Frequently they can't be found when the fund steps up its collection efforts.

¹⁵³ For example, pedestrians who are members of non-car-owning families, automobile owners with insurance but no uninsured motorist coverage, and occupants of uninsured cars.

¹⁵⁴ It is usual for these statutes to allow financial responsibility to be shown by liability insurance or by posting cash, securities or a bond. Only a miniscule number of drivers fulfill the laws other than by insurance. Although we speak of these statutes as compulsory insurance laws, we are not suggesting that the alternative ways of evidencing financial responsibility should not be permitted.

Michigan, the only other state to enact such a law in recent years, seems to be protecting the financial integrity of its fund by a "tough" claims payment attitude.

New York is a somewhat special situation. A form of uninsured motorist coverage was devised in 1955 in an effort to head off compulsory insurance. The effort was unsuccessful and the compulsory insurance law was enacted. The opponents of compulsory insurance law had pointed out that some gap would still exist. The legislature responded by enacting also the Motor Vehicle Accident Corporation Law (MVAIC). All insurers writing automobile liability insurance are members of the corporation and are obliged to supply the funds from which it paid claims against uninsured motorists. In 1965 these claims were brought under the uninsured motorist cover, but some miscellaneous claims are still handled by MVAIC.

(2) To require each purchaser of insurance to buy uninsured motorist coverage.

This coverage promises to pay the damages the policyholder sustains by reason of the negligence of the owner or operator or of an uninsured motor vehicle. The amount of the damages and whether the insured is entitled to recover against the uninsured are determined by agreement or by arbitration. The arbitration agreement is forbidden in a few states and not enforceable in several others. Where it is enforceable, it serves, among other things, to make the conflict of interest between the company and its own policyholder less troublesome.

When the company has to pay a claim against the uninsured motorist, it can assert subrogation rights against the uninsured motorist. He receives no protection under the coverage. It is not our impression that these rights are being vigorously pursued, and we suspect that they are not of much financial value. In many states, the average cost of a case under the uninsured motorist coverage is substantially higher than the average cost of cases under the regular liability coverage.

Eleven states¹⁵⁵ make uninsured motorist a mandatory part of every automobile liability policy. Thirty-five states¹⁵⁶ require an insurance company to offer uninsured motorist coverage to their policyholders and give the policyholder a right to reject it. The rejection rate is very low.

¹⁵⁵ As of September 1, 1968, Connecticut, Illinois, Maine, Massachusetts, New Hampshire, New York, Oregon, South Carolina, Vermont, Virginia and West Virginia.

¹⁵⁶ Graham, Recent Interpretations of the Uninsured Motorist Endorsement, THE FORUM 160 (1969), gives a list.

This is a highly useful coverage. The questions that nag are (1) whether it is proper to force the policyholder himself to pick up the tab for the damages caused by those who refuse to insure and (2) whether the conflict of interest between the policyholder seeking to collect damages caused by the uninsured at the expense of his own company is a tolerable conflict. If the uninsured claims against the policyholder, it is to the company's financial interest to establish the innocence of its policyholder. But in the claim made by the policyholder against the uninsured, the financial interest of the company encourages an effort to establish that it was the policyholder himself who was at fault.

(3) To require universal compulsory liability insurance.

This is so obviously the direct route to closing the insurance gap, and apparently the one favored by the public, that one wonders why it has not been adopted more widely.¹⁵⁷ The answer is simple, but the explanation more complex.

In earlier days compulsory insurance was feared by the insurance companies because it seemed certain that regulation of rates would follow and that there would be downward pressures on agents' commissions. Both did occur in Massachusetts. But now rate regulation in some form is in effect everywhere, and downward pressures on commission scales has developed from other causes. Thus, these old reasons have lost their persuasion.

Another reason often stated is that compulsory insurance increases claims frequency and thus pushes insurance costs upward. Massachusetts does have a high claims frequency, and insurance costs in urban areas are high. But since neither New York nor North Carolina present a similar picture and since all three compulsory states differ in these respects as among themselves, it is probable that the true explanation underlying high claim rates and high insurance costs is a combination of demographic factors and traffic conditions.

One other point that often escapes attention is that compulsory insurance newly forces irresponsible people, especially those living in urban areas where accident rates and insurance costs are high, to become at least financially responsible. After that, there is some sense in seeking damages from them. Thus, an increase in claim frequency is to be expected. This, in one important sense, is why com-

¹⁵⁷ The most frequent reform mentioned in the Michigan survey was compulsory liability insurance. AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 106, note 45. In 1961 the Opinion Research Corporation of Princeton, New Jersey, conducted a survey in which one of the questions was, "Do you think all car owners should be required by law to carry automobile liability insurance, or not?" Of the responses, 92 were "Yes," 4 per cent "No" and 4 per cent had no opinion.

pulsory insurance laws are passed at all.

A high claims frequency is evidence that such laws are doing what they are intended to do--protect the innocent traveller upon the highway from sustaining uncollectible damages because of the negligence of financially irresponsible drivers. The point is stated by Professor Sajjad A. Hashmi, Associate Professor in Insurance at Ball State University, as reported in The National Underwriters, August 16, 1968: ". . . an increase in claim frequency is built into compulsory insurance. The . . . purpose is to reimburse the innocent victims who are unable to collect when insurance is not compulsory. . . an increase in claim frequency is not the fault but the natural and desirable outcome of compulsory insurance." Professor Hashmi also says that "Almost every year there are states without compulsory insurance whose percentage increase in accidents is greater than any of the three compulsory insurance states."

Many years ago it was stated that "the chances of receiving compensation from an insured driver are four times greater than from one who is uninsured."¹⁵⁸ The experience and observation of members of the Committee would not indicate that any great change has occurred. We deem it imperative that the financial responsibility gap be closed, and we believe that the benefits from doing so far outweigh any disadvantage that we can perceive. We realize that the problem of finding ways of administering compulsory insurance laws with due regard to a proper balance between the cost and other burdens of rigorous administration, and the desire for maximum effectiveness, is one that deserves careful study.

Our recommendation is that the states that have not done so adopt compulsory automobile insurance laws applicable to both bodily injury and property damage liability, and that the required limits of liability be not less than \$10,000 for damages from bodily injury sustained by one person as a result of one occurrence, \$20,000 for all such damages sustained by two or more persons as a result of one occurrence, and \$5,000 for property damage in one occurrence. These suggested limits may seem unduly conservative, but it should be realized that they are minimums, that many people will buy higher limits and that most insurance companies will desire to provide higher limits. A recommendation that higher limits be required might turn out to be an obstacle to the enactment of compulsory insurance laws. We do not wish to obstruct the accomplishment of what we view as an important and much needed improvement.

¹⁵⁸ Report of the Joint Legislative Commission to Investigate Automobile Insurance, New York Legislative Document No. 91 (1938), at 196. KEETON & O'CONNELL SS, give some up-to-date data.

B. The Insolvency gap

Occasionally an insurance company will become insolvent. When this occurs, claimants wait a long time to be paid and usually receive something less than payment in full. This gap, though statistically small, should be closed.¹⁵⁹

We do not think our task includes making a study of the causes of insolvency and considering how they may be eradicated. Rather we seek ways to assure that claims and judgments will not go unpaid because of the insolvency. One route toward this goal is to create an insolvency fund from which payment can be made. A few states have done so. The funds are supported by assessments against insurance companies. In 1966 Senator Dodd introduced a bill (S. 3919) for a national insolvency fund. The creation of state funds of any sort is usually resisted, and opposition is generally successful. Perhaps it is better to look elsewhere for an acceptable device for closing this gap.

Fortunately, it has been discovered and is rapidly being put into effect. It is to require that "insolvency protection" be included as part of the uninsured motorist coverage. As of September 1, 1968, some 30 states had done so. In the remaining states coverage is included voluntarily by bureau companies and by many nonbureau companies.

Even though a large part of the function of the uninsured motorist coverage will be taken over by compulsory insurance, if our recommendation in that respect is followed, the uninsured motorist coverage still has a valuable mission. Not only is it a convenient way to plug the insolvency gap, it also is useful to close the miscellaneous gaps that remain even after a compulsory insurance (or unsatisfied judgment fund) law has become effective. These are: accidents with non-residents from nonreciprocating states, hit-and-run cases, stolen car cases, cases involving unregistered cars, cases involving vehicles operating after insurance has been cancelled but before revocation of registration has occurred, etc.

Once compulsory insurance has been effective, the aggregate size of the remaining gaps becomes small and the cost of filling them so nominal as to make unnecessary any great concern about where the cost falls or about possible conflicts of interest.

We do not think that the uninsured motorist coverage should be the means of closing the sizable gap between the levels usually reached under financial responsibility laws and universal coverage. To do this

¹⁵⁹ JOURNAL OF AMERICAN INSURANCE, January-February, 1968, at 7, reports that only .43 of 1 per cent of automobile insurance policies issued from 1960 to 1965 were written by companies that became insolvent. Claims against insolvent companies amounted to approximately one tenth of 1 per cent of all auto insurance claims.

saddles each voluntary purchaser with additional costs ranging from approximately \$5.00 to \$10.00. We do think it should be the means of closing the miscellaneous group of smaller gaps that remain after compulsory insurance laws have become effective. The cost of uninsured motorist on this basis should be nominal--not over \$2.00--depending on the stringency with which compulsory insurance laws are administered and how widely they are adopted.

We recommend that compulsory insurance laws require that every policy issued contain a form of uninsured motorist coverage that includes "insolvency protection."

C. The limits of liability gap

A very small percentage of cases result in claims or in verdicts in excess of the limits of liability provided by the policy. Often the effort to collect the excess is fruitless because the defendant is not financially responsible.

The standard or basic limits required to comply with most state financial responsibility or compulsory insurance laws are \$10,000 for bodily injury sustained by one person as the result of one occurrence, \$20,000 for all such damages sustained by two or more persons as the result of one occurrence, and \$5,000 for property damage in one occurrence. Three states (Louisiana, Mississippi and Oklahoma), which are financial responsibility states, have limits of only \$5,000/\$10,000/\$5,000, and one of the compulsory insurance states (Massachusetts) requires only \$5,000/\$10,000. Only one state (Connecticut) has limits as high as \$20,000/\$40,000/\$5,000, and only five (Alaska, California, Maryland, Virginia and Washington) require \$15,000/\$30,000/\$5,000.

It would be desirable that these limits would be higher. Many persons do buy higher limits voluntarily, and in Massachusetts it is believed that 70 per cent do so. Professor Hashmi gives the figures of 68 per cent and 48 per cent for New York and North Carolina.¹⁶⁰

The chief obstacle to requiring higher limits is cost, direct and indirect. Many insurance claims men believe that higher limits tend to push claims cost up even when the claim is within the available limits. If this is so, there is some indirect upward cost push along with the direct cost of the higher limits. It costs about 15 per cent more to move from \$5,000/\$10,000 to \$10,000/\$20,000. It costs about 15 per cent more to move from \$10,000/\$20,000 to \$20,000/\$40,000 and 41 per cent more to go from \$10,000/\$20,000 to \$100,000/\$300,000.

Appreciating how difficult it is to secure the adoption of reforms that have cost increases associated with them and believing that certain other recommendations we are making will accomplish more than increasing

¹⁶⁰ Hashmi, p. 124.

the required limits of liability, the Committee is limiting its specific recommendation to the states that now require less than \$10,000/\$20,000. We recommend continued efforts to persuade insurance buyers that higher limits are advisable, and we recommend that states now requiring limits of liability less than \$10,000/\$20,000/\$5,000 change their statutes to require at least those amounts.

10. Deterrence

It has become fashionable for legal writers to scoff at the idea that the fear of being held at fault in an automobile accident and liable for damages still serves to deter negligent driving. Perhaps, the argument runs, in the days before insurance became so nearly universal the defendant himself suffered a direct financial penalty if held responsible and there was something to the deterrence idea. But not today when, by merely purchasing insurance, the defendant escapes personal liability.

We are not aware of any empirical evidence that would prove conclusively that the prospect of being held at fault and subject to a financial burden does or does not deter negligent conduct.¹⁶¹ We do know that from ancient times the deterrence idea has been part of the law. It is deeply rooted in the instincts of mankind, and we prefer to believe it. We do not wish to accept the idea that normal human beings change their usual good conduct patterns, patterns which have been established in a society that regards negligent conduct as something to be penalized, merely because they can contract with someone to relieve them of the financial burden of negligent conduct. Otherwise we would have to question whether liability insurance itself was against public policy. These questions were raised two generations ago. Fortunately for the institution of insurance, and for a society in which it is economically indispensable, the courts of that period held the qualms to be devoid of persuasive legal merit.

In 1912 the Attorney General of Iowa argued that writing automobile liability insurance was against the public policy of that state. But Judge Sherwin, holding against this view said that although there might be a few among the 50,000 Iowa automobile drivers who were "so careless and heedless about the lives and limbs of their neighbors as

¹⁶¹ But there is evidence that legal sanctions do affect human behavior in the desired direction. See, especially, Barmack & Payne, The Lackland Accident Countermeasure Experiment, ACCIDENT RESEARCH 665 (1964), and CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, REPORT ON THE RELATIONSHIP BETWEEN CONCURRENT ACCIDENTS AND CITATIONS (1965). And see, Andenaes, The General Preventive Effects of Punishment, 114 U. PA. L. REV. 949 (1966), and ". . .there is simply no reason to believe that drivers will drive more carefully if liability is imposed without fault" Quoted from "Some Thoughts on Tort Law From a Sociopolitical Perspective", Robert L. Rabin, WISCONSIN LAW REVIEW, Vol. 1969: 51 at 66.

to be unworthy of any kind of protection, nevertheless, the vast majority wouldn't, if they could help it, run over 'an old hen that persists in crossing the road just ahead of the car or under it' let alone do damage to a fellow human being."¹⁶²

But the idea that insurance itself has an adverse effect on insured drivers had a slow death. It was used in 1922 by a legislative commission in Massachusetts as an argument (ultimately unsuccessful) against compulsory insurance. In 1936 Professor Ralph H. Blanchard, writing about the Massachusetts compulsory law, said that it had "frequently been contended that the Act had increased accidents." He went on to state his own view that "insurance has no appreciable effect on the safety with which these insureds drive."¹⁶³

But, accepting the view that liability insurance has no adverse effect on driver behavior, does it also have some beneficial effects? We cannot point to any collection of specific factual evidence that it does. We can, however, make some observations about the way in which insurance underwriting and rating practices build into the system a substantial amount of personal detriment from being at fault--or even involved--in an accident. We doubt our ability to prove by factual evidence that this detriment equates with deterrence of negligent conduct. But, if personal detriment does so equate, and we believe it does, deterrence is still present.

If a driver has established by his record a status as an undesirable risk he may have to resort to the assigned risk plan to secure insurance. This in itself seems to be such an unpopular status as to cause a motorist to strive to avoid it. Even if one secures insurance in the open market in the limits he wishes to buy, there is still some possibility of a verdict in excess of these limits.

A considerable number of automobiles are in fleets owned by those whose insurance costs, because based upon experience rating plans, are directly related to the accident records of the drivers. Education for safe driving, particularly directed at these large risks, has become an accepted insurance cost-saving technique. More and more individually owned cars are subject to merit rating plans which take safe driving or bad driving into account in determining insurance rates.

In a very real sense the deterrent effects of suit and recovery against a defendant who has something personal at stake are being built into the system by the very circumstance--the spread of liability insurance--that is sometimes pointed to as having destroyed its value.

¹⁶² American Fidelity Co. v. Bleakley, 138 N.W. 508.

¹⁶³ Compulsory Motor Vehicle Liability Insurance in Massachusetts, 3 LAW & CONTEMP. PROB. 537 (1936).

Automobile Accident Costs and Payments states:

"Tort law may well be viewed as a negligence deterrent. It purports to impose burdens only on those who are found guilty of negligence, and to confer benefits only on those who are free from it. . . The possibility remains that fear of liability may have an effective role in inducing 'safety practices' which would make accidents less likely. . . But the 85% who carry insurance may think of their driving habits as exposing them to higher insurance costs--drivers may have a desire to avoid accidents in order to keep their insurance in force at minimum rates--less compulsive than the fear of a ruinous liability for damages; it would not necessarily be less effective in reducing accidents. . . If tort actions were abolished or severely diminished, the license suspensions which result from unpaid judgments would fall by the wayside, and a presumed deterrent to negligence would be lost. . . It appears that tort law probably furnishes important incentives to avoid involvement in accidents involving injury to others, and to avoid conduct which will be charged as negligent, even if it does not unfailingly punish the guilty and limit its reward to the completely innocent. None of the other systems appears to furnish an equal incentive in this direction."

The entire subject of deterrence needs more scholarly attention, and this is now being supplied. In "Some thoughts on Tort Law," (supra note 161) at p. 67, it is noted that the theory of general deterrence since it operates first against financially deprived drivers operates regressively and is politically unrealistic." We hesitate to pick the winner in the game of academic oneupsmanship carried on by Professors Blum, Kalven and Calabresi. If the reader wishes to decide for himself the materials cited in the footnotes will be useful.

Professor Roger C. Cramton¹⁶⁵ has suggested that the strongest deterrent effects of civil liability are found in the automobile insurance system. Not only does the imposition of an increased rate push in the direction of inducing better driving to regain a lower rate,

¹⁶⁴ Blum & Kalven, The Empty Cabinet of Dr. Calabresi, Auto Accidents and General Deterrence, 34 U. CHI. L. REV. 239 (1967); Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, 78 HARV. L. REV. 713 (1965); Calabresi, Fault, Accidents and the Wonderful World of Blum and Kalven, 75 YALE L. J. 216 (1965); Schwartz & Orleans, Of Legal Sanctions, 34 U. CHI. L. REV. 274 (1967).

¹⁶⁵ Driver Behavior and Legal Sanction--A Study of Deterrence, 67 MICH. L. REV. 421 (1969), also in PROCEEDINGS OF THE SECOND ANNUAL TRAFFIC SAFETY RESEARCH SYMPOSIUM 181.

but parental supervision that may be effective in improving driving habits of young drivers may be the result of the higher insurance costs resulting from the record of the young driver. The insurance rating system can offer rewards as well as penalties, thus reinforcing and enhancing the educational effect of the sanction.

It is curious that rating systems, which seek to make use of refined status classifications and then modify the classification rate by taking the individual's accident or violation record into account, encounter criticism and demands for more equal terms. At the same time, demands are being made that each man should be judged according to his abilities. The actuary who must somehow balance and accommodate these inconsistent demands needs not only skill and wisdom but also a clear understanding of what goals are being sought. We trust that the value of building deterrence into the system will not be underemphasized. Perhaps "merit rating" should not have to be justified on an actuarial basis.

We suspect that if we had an existing system for paying reparations to victims of auto accidents that did not pay any attention to fault, we would have persistent criticism of the system on the ground that it failed to deter wrongful conduct. We note with interest Dean Pedrick's "Tangential Introduction" to Dollars, Delay and the Automobile Victim:

Fires, he says, are not accidents--they are caused by humans with capacity for moral choice who are careless or worse. Fire losses are severe and getting worse. Safety campaigns (and the criminal law) have not worked well enough. Is the present way of paying for fire losses, i.e., a first-party related insurer basis really, attuned to the needs of the times? Is society sacrificing essential values? Generally we help protect life and property by relying on court proceedings to establish who did wrong. But in fire insurance this has been deemphasized in favor of mere reliance on insurance to spread loss. Shifting to a system of judicially supervised assessment of individual responsibility would offer the prospect of assessment of moral responsibility, fixing blame, finding the fault. This should have a salutary effect, a prospect of dramatic reduction in the number and severity of fires. Moreover, this solemn assessment of fault in the setting of a judicial trial contributes to the satisfactions of a well ordered society. It would be good to know that wrongdoers will be brought to book, that anti-social conduct does not go unnoticed and unpunished. Any added expense would be "justified in terms of the intangible satisfactions that come from a fault system of assessment of responsibility."

Dean Pedrick clearly has his tongue firmly planted in his cheek. But if the auto reparations system were a no-fault system, we have little doubt that not only the professors would be pointing the scornful finger in full seriousness.

The committee has had the benefit of seeing a preliminary draft of a paper by Professor Harold Demsetz of the University of Chicago (and a member of the commission) entitled "Issues in Automobile Accidents and Reparations from the Viewpoint of Economics." This paper points out that the efficiency of our present system cannot be judged solely by its performance in the cases it handles, but that the savings in accidents that do not take place because of the system must be taken into account. Various alternatives to the tort system are considered, and it is pointed out that the tort system places more incentives to "economize on accidents" into play than does any of the alternative systems that he considers. This, because it places accident losses on the automobile industry by placing the costs on automobile owners rather than upon society as a whole and also on those who have driven most carelessly. He concludes that the tort system does play an important role in providing incentives for economizing on accidents, even if most losses are paid through liability insurance. We agree.

We are not trying to say that the tort law should be relied on to be the chief deterrent to dangerous conduct. But this is one of its traditional objectives. Unless the tradition is clearly false, there is no reason to eliminate it from the armamentarium of the cause of safety. Of course, we should continue to look to the criminal law. But it cannot do the job unaided. Liability insurance does have a unique opportunity. It can educate, punish and reward. These efforts should not be discouraged.

We conclude this subsection with three quotations from Blum and Kalven.¹⁰⁰

"It is quite possible. . .that there are many situations in the auto world in which imposition of liability adds a significant stimulus to prudence. ."

". . .there is much room for experimentation and greater daring in setting insurance rates for the sake of creating more deterrent impact."

"To us there remains great force in the notion that no one should be worse off because of the wrongdoing of another so long as the wrongdoer, or his insurer, is in a position to make redress. The law ought not to break sharply with the moral traditions of the society, as it would do were it no longer to recognize fault and personal responsibility. And we would urge that not all reflection of moral values should be

¹⁰⁰ Blum & Kalven, Public Law Perspectives on a Private Law Problem, 1960 at 65 and at 69 and The Empty Cabinet of Dr. Calabresi, 34 U. CHI. L. REV. 158 (1967).

left to the criminal law. The tort system can share some of the burden of satisfying indignation."

We agree. We reject the criticism that deterrence is no longer valid.

Our recommendation is that efforts to utilize the tort law and the insurance rating system, as well as the criminal law, to strengthen deterrence of dangerous driving be continued, and that studies be encouraged to seek further enlightenment as to how such effects can be most effectively and acceptably strengthened.

11. Absence of Criticism of Certain Important Functions of the Present System

In concluding this section of our report, we think it is worth noting that there seems to be an absence of significant criticism directed at the manner in which some important functions of our present system are being performed. We hear little criticism of the manner in which claims are investigated, or of the professional skill and zeal with which those having claims are served by their attorneys, or of the professional skill and zeal with which those accused of negligent conduct are being defended against false, exaggerated or otherwise unfounded claims. The present system does, it would seem, well fulfill the needs of automobile owners who, under the tort law, need and obtain protection against the financial impact of a damage judgment against them. Nor does there seem to be any particular or widespread complaint about the manner in which the judicial function is being performed, once the case reaches the courtroom.

V. CONSIDERATION OF CERTAIN PROPOSALS FOR CHANGE

1. The Keeton-O'Connell Basic Protection Proposal

Of all the numerous proposals for changes in the tort law and in the manner of compensating victims of automobile accidents, the Keeton-O'Connell plan has attracted by far the most attention. This proposal was announced in a book, Basic Protection for the Traffic Victim, published in 1965. The authors, Robert E. Keeton and Jeffrey O'Connell, are law school professors, Professor Keeton at Harvard and Professor O'Connell now at the University of Illinois. Both have been engaged actively in fostering the plan by speeches, radio and TV appearances, debates and articles. Lawyers, insurance executives, newspaper reporters, magazine writers and others have actively discussed the plan, and a full bibliography about it would be long and is still lengthening.²

The plan has received much legislative attention, having been introduced in not less than seven states and in one state (Massachusetts) having reached the point of a favorable vote by one branch (the House of Representatives) of the legislature.

It is not easy to state the Keeton-O'Connell plan in a manner both simple and reasonably accurate. The description that follows is obviously incomplete, but we hope not misleading.

In essence, the plan proposes that as respects automobile bodily injury cases worth over \$100 of "net loss", but not having a value of over \$10,000 because of economic loss or over \$5,000 because of pain and suffering, the tort law shall no longer apply. It also proposes that everyone registering a motor vehicle must purchase "basic protection" insurance that will pay certain benefits to himself and to relatives residing in the household. Having done this, he is exempt from tort liability, except that he remains subject to tort liability at the suit of those injured by his negligence (1) for the first \$100 of "net loss" and (2) for the excess over \$10,000 of economic loss or over \$5,000 of loss from pain and suffering. As to these two categories of cases, he need not insure

1 Eight such plans are discussed in the Keeton-O'Connell book. Professor Willis Park Rokes has compiled a COMPENDIUM OF AUTOMOBILE INDEMNIFICATION PROPOSALS, published by the University of Omaha, which lists twenty-eight proposals.

2 Selected Bibliography on Automobile Insurance Reform Plans, 23 RECORD OF N.Y.C.B.A. 197 (1968), lists 242 items, of which approximately 60 relate directly to the Keeton-O'Connell plan. See also, Klein, Basic Protection: Acceptance or Rejection? in 1967 SURVEY OF AMERICAN LAW, 663, note 13. Professor Rokes' Compendium also contains a bibliography of 141 items, many dealing with the Keeton-O'Connell plan.

See also, Sargent & Corboy, The Basic Protection Plan--Panacea or

his liability; insurance is voluntary. Only the "basic protection" coverage is compulsory.

The "basic protection insured" makes his claim for his "net loss" against his own insurance company, not the insurer of the other car involved in the accident. If he sues in tort, he sues the owner or driver of the other car and that suit is defended by the insurer of that car. Within the limits of the basic protection coverage, he is entitled to recover his lost wages up to \$750 per month. The "reasonable charges incurred for reasonably necessary" hospital and medical services are recoverable. Hospital charges are limited to the charge for "semi-private accommodations." Funeral and burial expense up to a total of \$500 is recoverable. In calculating "net loss," up to 15 per cent of loss of income is subtractable to compensate for the fact that certain elements of the recovery are free of income tax.

Benefits from collateral sources (such as wages continued gratuitously or under a contractual plan, workmen's compensation benefits, social security disability benefits, medicare, military and veterans' benefits and accident and health insurance benefits of all sorts) are also subtracted. No basic protection benefits on account of pain and suffering are provided. From whatever amount remains after these various subtractions, there is a deductible of \$100 or 10 per cent of work loss, whichever is greater.

The impact of the plan on the tort system, the amount of benefits automobile accident victims receive, on lawyers, and on the insurance system, is tremendous. In effect, the tort law is abolished for about 75 per cent of automobile bodily injury cases. The cases taken out of the system account for about the same percentage (75 per cent) of all the money paid to dispose of automobile bodily injury claims. The cases left in the tort system are those under \$100 in value and those in which the economic loss is in excess of \$10,000 or in which the value of pain and suffering is in excess of \$5,000.

As respects claims for basic protection benefits, jury trials are abolished if the amount in controversy is under \$5,000.³ As respects benefits an innocent victim of an automobile accident is likely to receive:

Inequity, 44 NOTRE DAME LAW 51 (1968); O'Connell, A Balanced Approach to Auto Reform, 41 COLO. L. REV. 81 (1969); King, The Insurance Industry and Compensation Plans, 43 N.Y.U.L. REV. 1137 (1968).

³ See the Keeton-O'Connell book at p. 323, 493, and 504. The provision abolishing jury trials in such cases is not found in the 1968 Rhode Island version of the plan (S512) nor in the 1969 Rhode Island Bill (H1141). In the 1968 Massachusetts proposal providing for Basic and Added Protection at the option of the policyholder (H4820) Sec. 18 provides: "There is a right of jury trial with respect to claims for basic or added protection or both..." Such a provision is also found in Sec. 113-3.10 of the proposed 1969 Mass. Motor Vehicle Basic Protection Act (H 4439).

in the cases removed from the present system there is a great reduction because in most cases (1) nothing is paid for "pain, suffering, and inconvenience", (2) nothing is paid for disfigurement, (3) benefits from collateral sources are subtracted, (4) nothing is paid under the plan if the net loss is less than \$100, (5) nothing is paid for work loss in excess of \$750 sustained in any one month, and (6) from whatever may be payable the first \$100 of net loss is deducted, or, if greater, 10 per cent of work loss is deducted.

The total benefit reductions have been computed to amount to 75 per cent of what would now be paid on the same cases.⁴

There are, however, some persons who would be newly qualified for benefits: (1) the driver who is clearly at fault (e.g., he is drunk, he runs into another car from the rear, backs into another car, etc.), (2) a person injured in a questionable liability case who would not now receive a settlement. Some of these are minor cases which are now ignored by the claimant, others are those in which claim is made but liability is denied and the denial is accepted. (3) the driver of the car in the one-car accident, e.g., the car runs into a tree. Actuary Wolfrum (see footnote 4) computed these additions as having the effect of increasing the amounts to be paid by a total of 30 per cent.

The impact of the Keeton-O'Connell plan on the casualty insurance business would not have any controlling influence upon our views if it stood in isolation. We are mindful, however, that such a large and important industry (its annual premium volume amounts to about ten billion dollars) should not be disrupted severely without persuasive reasons. Moreover, some consideration of the impact of the Keeton-O'Connell proposal on the casualty insurance industry will aid us in more fully comprehending the proposal itself.

Clearly there would be a reduction in premium income. No actuary seems to be able to say how much without being contradicted by another.⁵ But this is not as great as it might seem at first glance because the proposal does not (in its original form) include property damage liability cases. Nor is collision insurance involved. Furthermore, a prudent person will still purchase bodily injury liability insurance to protect himself against claims which exceed the "threshold" amount of \$5,000 for pain and suffering and \$10,000 for other damages, although such insurance

⁴ Remarks of Richard J. Wolfrum, [Actuary], 1967 U. ILL. L. F. 538. The effect of the subtraction of collateral source benefits was estimated to amount on the average to 25 per cent. Many claimants will have a 100 per cent reduction in benefits.

⁵ See the comments of actuaries Wolfrum, Harwayne and Bailey in 1967 U. ILL. L. F. 479 et. seq.

is not compulsory under the plan.⁶ He would also need insurance in the usual form when his car was used in states that had not adopted the Keeton-O'Connell proposal. Perhaps he would also want liability insurance as respects the first \$100. Perhaps he would buy various supplemental coverages to protect himself and his family above the amounts payable as "basic protection."

Apart from the direct financial impact, the entire insurance industry would have to "retool." Almost all automobile policy forms, endorsements, claim reports, statistical forms, bills, etc., would have to be redesigned. New claims investigation procedures would be necessary. New rate-making methods would have to be devised.

A new underwriting concept would have to be developed because under basic protection insurance the undesirable policyholder is the one most likely to take money from his company and the desirable policyholder the one who is least likely to do so. In liability insurance the best risks are those least likely to cause their company to pay benefits to someone else. Under basic protection coverage costs are shifted away from people most likely to be at fault in accidents to those most likely to collect money as a result of the accident. This new concept would, in some manner as yet not described by anyone, have to be combined with the present concept.

Insurance ratemakers would have to explain the logic of shifting costs that now rest upon owners of commercial and long-haul trucks to private passenger car owners. These trucks seldom carry passengers. The driver is entitled to workmen's compensation benefits and probably to wage continuation benefits. He won't collect from the plan. But the driver and passengers in the private passenger cars may not have such sources and are more likely to collect. Unless some action is taken to prevent this shift in costs or to offset its effect, truck rates for basic protection insurance would go down; private passenger car rates for basic protection insurance would go up.⁷

⁶ The 1969 Rhode Island bill (H 1144), requires, as a prerequisite to registration of a motor vehicle, security (insurance or other proof) for the payment of basic protection benefits, the equivalent of property damage dual option benefits and also liability insurance with not less than limits of \$15,000 per person and \$30,000 per accident. See p. 47 of the legislative draft.

⁷ See Remarks of Richard J. Wolfrum, [Actuary], at p. 548, 1967 U. ILL. L. F. We do not find anything in the plan as stated in the Keeton-O'Connell book which appears to us to be designed to avoid or offset such shifting of costs. The provision is that rates shall be reasonable and adequate for the classes of risks to which they apply, that classifications shall be reasonable and that accident involvement may be taken into account (Sec. 11a, p. 338). The 1968 Rhode Island version of the plan as stated in S512, contains language apparently designed to make it possible to avoid or to offset the shift in costs. See Sec. 27-33-11. The R.I.

Someone will have to explain why it is fair for residents of the state to pay for injuries caused by residents of another state, including injuries sustained by the residents of the other state.

The loss portion of the premium dollar for basic protection coverage is so sharply reduced that the "overhead", already criticized as being high, becomes proportionately much higher. No expense savings sufficient to keep matters in about the present balance are in sight.

As to the effect of the plan on court congestion, it has been assumed generally that Professors Keeton and O'Connell assert that their plan will relieve court congestion. We are not certain they do. The book, while heaping blame on motor vehicle cases and the fault concept for congestion, seems not to contain affirmative statements that the plan will actually relieve court congestion.

On the other hand, Professor Kalven doubts that personal injury litigation is the principal cause of court congestion⁸ and Professor Milton D. Green thinks that the plan is likely to increase court congestion since, being financed by the no fault benefits, claimants will have little to lose by trying for the jackpot. It also has been questioned whether the word will get around in the jury rooms that the plaintiff can get for his pain and suffering only the excess over \$5,000 and that some juries will say "He ought to get \$1,000, so let's make our verdict \$6,000."¹⁰

It is our opinion that most of the numerous changes that in combination make up the plan could not be enacted if they were proposed by separate bills. We think that claimants injured by the fault of another will not be satisfied with substantially reduced benefits. Automobile insurance buyers as a group will not willingly pay a substantial bill for benefits to those injured through their own misconduct. Persons who have provided benefits for themselves, paying for them out of their own pockets or as part of the wages contracted for, will not tolerate being deprived of the results of their own foresight and thrift.

The premises of the plan (difficulty in determining who was at fault; juries unable to cope with trial techniques; damage awards not

1969 bill (H 1144) also contains such a provision, (Sec. 27-33-11) as does the Massachusetts 1969 proposed "motor vehicle basic protection act", see Sec. 113-11.1.

⁸ ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURT 29, note (1959).

⁹ 1967 U. ILL. L.F. 464. See also, Green, Basic Protection and Court Congestion, 52 A.B.A.J. 926 (1966).

¹⁰ Conard, 1967 U. ILL. L.F. 440

well keyed to the damages sustained) have not been established by persuasive evidence, they are mere opinions.

There is not sufficient justification for switching to a first-party basis for cases within the plan but continuing the present system for all other cases. Is it not satisfactory to identify cases to be taken out of the present system by using such a subjective test as the value of pain and suffering.

Unfortunately, there has been some tendency to equate whether one is in favor of improvement in the automobile insurance-tort-reparations system with whether one is in favor of the Keeton-O'Connell plan. There are, however, other ways to achieve reform and improvement which in our judgment do not suffer from the serious defects of the Keeton-O'Connell plan, are more worthy of adoption and should command the support of those who do favor improvements in our present system.

We have been discussing the Keeton-O'Connell plan as set forth in Basic Protection for the Traffic Victim. As indicated by footnotes 3, 6, 7 and 11, there are other versions of the plan. The bill introduced in Rhode Island in 1968 (SB 512) is, according to a statement made in the September 9, 1968, Report of the American Insurance Association committee, "believed to reflect the authors' current thinking." 11

It not only requires basic protection insurance to be purchased, but also \$15,000/\$30,000 limits of liability insurance (a desirable change) and one of two forms of property damage coverage. Each form provides liability insurance for damage to property of others, other than a motor vehicle covered by property damage dual option insurance. One form, called the "non fault option," pays the owner for damages to his car, but without subrogation rights if the other car also is covered by a similar policy. The other form pays the owner only if he has a valid claim against the other owner under the liability rules. In effect, one must buy insurance on his own car or purchase property damage liability insurance with payments by his own company depending on fault of the other driver. As the stock company report says, "The insurance industry's experience with uninsured motorist coverage suggests that the administration of the fault principle on a first-party basis presents difficult problems." The dual option property damage coverage is cumbersome and confusing and does not make the plan more acceptable.

Still another variation of the Keeton-O'Connell plan is called "optional basic protection insurance." It was stated in a bill (HB 4820) introduced in the Massachusetts House in 1968. Under this the policyholder may elect basic protection insurance along with liability insurance. If he does so, he waives his negligence claim but would be entitled

11 A copy of the "Explanation" of this bill which was printed with the legislative draft is set forth in Appendix B, p. 186.

to receive, in lieu thereof, basic protection benefits, i.e., without regard to fault. As a result of a single accident, an insurance company could find itself paying basic protection benefits to its policyholder and also paying tort damages to the driver of the other car, assuming he had not purchased basic protection coverage. Or its policyholder, not having purchased basic protection and involved in an accident with one who had, might not have a valid liability claim and the other driver having waived his tort claim, would have no claim. Thus, no one would be paid as a result of this accident. To smooth out the costs, a complex pooling arrangement is proposed.

Apart from the complexity, we fear the result of the waivers. They are made under the influence of an immediate saving in insurance cost. The result may be the loss of a future claim worth thousands of dollars more than the basic protection benefits. We do not think the optional plan is superior to the original version.

It is of interest to note that certain other changes have been made to recognize legislative distaste for the original concept that injuries recklessly suffered should be covered (See p. 396 of the Keeton-O'Connell book). The 1969 Massachusetts proposed "motor vehicle basic protection insurance act" (H 4439) contains a provision requiring insurers to offer an optional exclusion denying benefits to persons injured whose conduct contributed to the injury, i.e., operating a motor vehicle while under the influence of liquor or drugs, without authority, after suspension or revocation, upon a bet, in a race, and refusing to stop after signaled to do so by a police officer. These exclusions would apply whether the injured person is the policyholder or someone else.

While this sort of accommodation is doubtless necessary in dealing with legislative matters, and recognizing that the public policy question is troublesome, still we find it difficult to rationalize allowing the insured to make the choice which determines whether other persons should receive basic protection benefits.

We recommend that proposals that would severely reduce benefits payable to persons injured in automobile accidents or would abolish or substantially abolish the tort basis for the automobile accident reparations system, such as the Keeton-O'Connell Basic Protection Plan and the "Complete Automobile Protection Plan" announced by the American Insurance Association, be opposed.¹²

¹² This recommendation was made as part of the Report of the Special Committee on Automobile Accident Reparations submitted to the House of Delegates of the American Bar Association on January 27, 1969 and adopted by action of the House at that time.

B. The Proposal of the American Insurance Association

This proposal, in the form of a report of a Special Committee to Study and Evaluate Keeton'O'Connell Basic Protection Plan and Automobile Accident Reparations, dated September 9, 1968, came to the knowledge of the committee late in October, 1968.

The American Insurance Association is an insurance trade association having some 156 members, all (or almost all) stock insurance companies. They write about 38 per cent of the automobile liability insurance business of the country.

The essence of the proposal is that, as respects bodily injuries and property damage caused by automobile accidents, the tort law be abolished. This would be accomplished by requiring everyone who registers an automobile to purchase what amounts to an accident and health policy under which limited benefits would be paid to the owner and members of his family, to occupants of the car and to certain pedestrians. The purchase of this policy would entitle the owner to immunity from tort liability. There would also be such an immunity as to liability for damage to automobiles and to property other than automobiles. The owner of an automobile must assume the risk of damage to it. He could buy physical damage insurance (e.g., collision coverage) if he wanted to. The owner of property, other than an automobile, damaged in the accident (e.g., the owner of an electric light pole or a locomotive) would be paid for his damage under the automobile owner's policy.

The benefits are: (1) hospital and medical expense limited to the reasonable and customary charges for semi-private accommodations, (2) "work loss" limited to \$750 per month ("work loss" consists of loss of wages plus expenses incurred for services which the injured person would have performed without pay), (3) benefits on account of disfigurement or "permanent impairment" varying according to degree but limited to 50 per cent of whatever amount is payable for hospital and medical expense, (4) in death cases payment for funeral and burial expenses limited to \$1,000, and (5) additionally, statutory beneficiaries would be paid for "loss of tangible things of economic value (not including services)" and for expenses in obtaining services that the deceased would have performed.

From his benefit 15 percent of the loss of income is deducted unless the claimant can show that his tax advantage is less than 15 per cent.

Benefits from collateral sources are not deducted.

Persons, including non resident, injured in the state by uninsured vehicles or by non residents, can make their claim against an assigned claims plan supported by the insurance companies.

Non resident tortfeasors (unless their policies include the economic loss coverage) and uninsured drivers are not granted the tort exemption. The tort exemption does not apply as respects accidents in other states.

No new mechanism for disposing of disputed claims is provided. Jury trial is to be available.

In view of the built-in limitations on the amount of recovery for the various benefit items, no aggregate limit is felt to be necessary.

It is said that, on the average, the available savings will be approximately 29 per cent.¹³ This is on the basis of comparing aggregate premiums for \$25,000/\$50,000 bodily injury liability, \$5,000 property damage liability, \$1,000 medical payments, uninsured motorists and \$77 deductible collision with the premium cost of the new coverage, including out-of-state liability insurance and physical damage insurance.

Comments

The proponents of this plan state, as their opinion, that the present system is not working satisfactorily and will not work satisfactorily in the future. Reference is made to the fact that the Keeton-O'Connell proposal has attracted some support in Massachusetts and Rhode Island, and that Puerto Rico has a plan to provide some no fault benefits beginning July 1, 1969.¹⁴

It is easy to fail to differentiate between criticism of the tort system and criticism of certain insurance practices, such as cancellations, market shortages, elaborate classification plans, selective underwriting, etc. But differentiation should be made. And we can readily understand that the difficulty these companies have in securing what they regard as adequate rates leads to considerable frustration and impatience. But we do not think that these emotions or the failure to make careful differentiations supply a rational or persuasive basis for a proposal that would, if adopted, have such tremendous impact on the tort law and on the innocent victims of automobile accidents.

¹³ This figure has been challenged by other insurance trade associations. See DEFENSE RESEARCH INSTITUTE, AN ANALYSIS AND CRITIQUE, 10-11. It also has been pointed out that the alleged 29 per cent savings assumes that current rates are adequate, but the A.I.A. asserts that today's rates are inadequate by 10 to 15 per cent. See also the Report of American Mutual Insurance Alliance Actuarial Committee on Adequacy of the Costing of the American Insurance Association Plan (May, 1969).

¹⁴ The Puerto Rico plan preserves the principle of liability based on tort, except for cases valued at not more than \$1,000 for pain and suffering, or \$2,000 on account of other losses. It is outlined by Herbert S. Lennenberg and Juan B. Aponte in the June, 1968 issue of The Journal of Risk and Insurance.

Impact of the Proposal(1) Impact upon persons injured in automobile accidents

It is obvious that those who now receive no payment for injuries would be paid under the proposal. These are (1) those whose claims are so minor that they do not wish to pursue them under the present rules; (2) those who could not recover because there is no one to sue (e.g., the accident was a one-car accident); and (3) those who would now be barred because the accident was caused by their own fault. The size of this group is difficult to estimate. The estimates range upward from 27 per cent as large as the size of the group of claimants who do receive compensation for their injuries.¹⁵

The largest group of newly eligible people are those injured in cases where negligence is an issue and who, today, do not receive a settlement or verdict under the liability coverage. (Many do, however, receive medical payments under medical payments coverage.) About 30 per cent of these cases are now closed without payment. But since many of these are minor cases, the additional costs that can be attributed to making these claims payable without regard to fault may be less than 30 per cent. But this kind of analysis is frustrating because the magnitude of new claims problems is an imponderable. Handling first party claims when such elements as degree of impairment or disfigurement are involved will be a new experience for claims men. How much more "build up" of claims for lost wages will occur when the claimant is the policyholder? How much pressure will there be to pay more than the economic loss simply to end the claim and preserve a business relationship?

(2) Impact upon court congestion

Under the proposal every injury will present some questions that are not answerable by purely objective standards, for example:

- (a) Is the work loss genuine?
- (b) Is the proper deduction 15 per cent?
- (c) Were the expenses incurred for services reasonable?
- (d) Were the hospital charges reasonable and customary?
- (e) Is there any impairment? If so, what degree?
- (f) Is there any disfigurement? If so, what degree?

It seems clear that the new plan will not bring an end to disputes about the value of automobile accident claims. Cases involving non residents or non insured cars are likely to be at least as complex as at present. Whether the number of new disputed claims from claimants is great enough to more than offset the number of claims that are newly disposed of without controversy is very difficult to say.

¹⁵ See the papers of actuaries in 1967 U. ILL. L. F.: Harwayne, 479 at 542; Wolfrum, 538 at 546; and Bailey, 557 at 559.

(3) Impact on lawyers

The lawyer for the claimant is to receive his fee from the claimant unless the insurer unreasonably refuses or delays proper settlement. In itself, this is a dispute-breeding provision. The impact on lawyers' income is likely to arise more from the fact that claimants' benefits are greatly reduced than from a dearth of work for lawyers. A reasonable fee is likely to amount to a larger proportion of the recovery. The prospect is for somewhat less work for somewhat less money.

(4) Impact upon insurance costs

We are told that, using a stated basis of comparison, there will be average premium savings of approximately 29 per cent.¹⁶ But that is not very informative because the cost impact upon individuals depends upon how the total cost is distributed. The questions that need answering are: (1) Who will pay more, and why? (2) Who will pay less, and why?

It seems clear that under the proposal those who will pay less for insurance than they now do are those who, at present, pay high rates because they are identified as within the accident-causing groups. Those who may pay more than they do now, or whose reduction would be substantially less than the claimed average of 29 per cent, are those families having several adult members of the household. Even though these families may be very desirable risks today, they present relatively high "exposure" under the new proposal and presumably this fact will be reflected in the rate they must pay.

As in any plan that proposes non-fault benefits for automobile caused injuries, a basic flaw is the shifting of responsibility for the consequences of wrongdoing on the highways from the wrongdoer to the innocent. This results in a shifting of costs. Perhaps the easiest illustration is the shift in costs away from accident producing vehicles, such as trucks, to the ordinary passenger vehicle. Trucks seldom carry passengers. They would pay much less for the new type coverage than they do now. Now trucks may be held liable for injuries they cause to occupants for private passenger cars. Under the AIA plan they would not be held liable. The cost of paying for the injuries to passengers is shifted from the truck to the private passenger car, even if the truck is at fault.

This problem is recognized in the report accompanying the A.I.A. plan:

"...it is clear that commercial vehicles (except public carrying vehicles) will have little exposure because of the absence of family and guests in commercial vehicles. Accordingly, the

¹⁶ See footnote 13. The D.R.I. analysis states that "the plan may well turn out to be more expensive than presently projected."

"present cost borne by commercial vehicles will be shifted to some extent to private passenger vehicles. This will happen under ...the Keeton-O'Connell Basic Protection Plan...It is quite possible that society may view this shift as an unsound and undesirable windfall to commercial vehicles..."

(5) Impact on benefits

The A.I.A. plan adopts as a foundation a rigid, inflexible basis for payment -- i.e., economic loss as defined, with the definition itself relied on to eliminate the higher losses (wages over \$750 per month, hospital charges over the semi-private rate). Superimposed upon this is a subjective element, degree of impairment or disfigurement. But then the plan truncates the possible recovery of damages for such losses by imposing a ceiling -- 50 per cent of what is payable for medical and hospital. No sort of standard for establishing what is to be paid in those cases is stated.

The Keeton-O'Connell plan has an inflexible damage determining formula for the cases it takes out of the tort law but for other cases retains the present flexible damage determination rules.

As to how the benefits compare with present benefits as respects those who do receive settlements or verdicts, it is obvious that, on the average, the benefits are reduced by something like 50 per cent. This is a deduction, but we think a correct one. If many more people are to be paid something and if the cost is 29 per cent less without important reductions in expenses, the inescapable conclusion is that the benefits are much more thinly spread. But it is of greater interest to consider what may happen in particular cases.

A person with an amputated leg might reasonably incur \$2,000 in hospital and medical bills. He might be back at work after 2-1/2 months. Under the A.I.A. plan he might receive a total of:

\$2,000	for hospital and medical expense
\$1,875	for loss of wages
\$1,000	(50 per cent of the total of the medical and hospital items) for permanent impairment
<u>\$4,875</u>	Total

Under the present system a settlement of \$65,000 would not be uncommon, and higher verdicts would not be reduced. Under the present system a person earning \$750 per month, out of work for 15 days because of painful bruises and contusions, incurring X-ray expense of \$75, hospital expense of \$150 (3 days at \$50), medical expense of \$40 (4 visits at \$10) might, if he were not himself at fault and could establish fault on the part of the other party, reasonably receive a settlement of about \$2,000. Under the stock plan he would receive about \$700. He would receive the same \$700 under the plan if the accident had been caused solely by his own wrongful conduct.

Undeniably, benefits to the deserving are greatly reduced. Benefits to the undeserving (as we now regard those at fault) are greatly increased.

Comparisons with the Keeton-O'Connell Plan

The American Insurance Association plan is similar to the "first layer" of the Keeton-O'Connell plan. As respects bodily injuries, if the Keeton-O'Connell plan had not preserved the tort action for cases having values over the threshold amounts of \$5,000 for pain and suffering or \$10,000 for economic loss, but rather had gone all the way in abolishing the tort law, the two plans would be substantially the same except for the different treatment of collateral source benefits and the first \$100 deductible amount.

As to property damage, in its original form the Keeton-O'Connell plan retained the tort law for property damage cases. The A.I.A. plan abolishes it and requires the car owner to absorb his own loss directly or via the purchase of collision and comprehensive coverage. Much of what we have said about the Keeton-O'Connell plan applies to the A.I.A. plan. It has some simplicities not present in Keeton-O'Connell, chiefly the non necessity for identifying the cases to be removed from the present system and the absence of need to investigate collateral sources. But it introduces some new complexities. It will be necessary to measure the degree of impairment and disfigurement in many more cases.

Under Keeton-O'Connell, the underwriter, to evaluate a risk, must use partly an accident and health approach and partly a liability insurance approach. Under the A.I.A. plan, apparently, a straightforward accident and health concept is to be used.

Some deterrence is retained in Keeton-O'Connell by the potential liability for large verdicts and by the fact that accident-causing drivers (other things being equal) pay higher premiums. The A.I.A. plan abandons all reliance on deterrence from the prospect of being held at fault and apparently also abandons a rating device which has long been supported as in the public interest, i.e., merit rating on the basis of driver performance. It proposes compulsory insurance, thus abandoning another position (i.e., opposition to compulsory insurance) long held by the A.I.A. group of stock companies.

The Keeton-O'Connell plan also proposes compulsory insurance but not, in the original version, for the liability for damages in excess of the threshold amounts.

Legality

It seems likely that the stock company plan and the Keeton-O'Connell plan would be challenged as unconstitutional in at least all of the states in which the state constitution expressly forbids the enactment of any law limiting the amount recoverable for personal injury and death

(Arizona, Arkansas, Kentucky, Pennsylvania and Wyoming) or in which there are prohibitions against limiting amounts recoverable in death actions (New York, Ohio, Oklahoma, Utah).

It is one thing to require that an automobile owner give evidence of his financial responsibility to pay damages to those injured by his negligence before he operates the dangerous instrumentality on the highways. It was this legislative command that was upheld as a justifiable extension of police power in Opinion of the Justices, 251 Mass. 561, 147 N.E. 681 (1925). It is quite another matter to require one to provide, via accident and health insurance, benefits for himself even if he does not need them and even if he has already done so in the form of voluntarily purchased hospital, medical and disability insurance.

It is one thing to impose liability without fault upon those who operate automobiles on the highways, but another to wipe out all liability and substitute a required form of self protection. And what is the rational or legal basis for requiring residents of a state to pay for the injuries sustained by non-residents by their own fault?

There are other legal questions. Is the unequal treatment of those earning under \$750 per month (who recover their full wages) and those earning over \$750 (who recover half of their wages) based on an "invidious discrimination"? Is it equal protection of the law to require those injured in automobile accidents to accept a limited recovery while those injured in other types of accidents continue to receive full damages? That the proponents of the 1932 Columbia plan argued that it was constitutional¹⁷ is no reason for assuming the constitutionality of this plan or the Keeton-O'Connell plan.

Nor does the fact that workmen's compensation laws were upheld, sometimes only because they were elective, furnish a sure basis for confidence that the American Insurance Association plan is legally unassailable. Persons affected by automobile compensation laws bear no contractual relationships to each other as do employer and employee, and no theory based on that relationship is applicable here.

Conclusion

The A.I.A. plan would have a totally destructive impact on the present system. It grants immunity to the innocent and guilty alike. Efforts to make the tort law serve the cause of safe operation of automobiles are abandoned. The objective of making awards of damages in

¹⁷ REPORT OF THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 166 (1932). See also, Compensation for Automobile Accidents; A Symposium, 32 COLUM. L. REV. 785 (1932).

amounts that will fairly compensate for the particular injury is given up.

The jury is retained but its role is so diminished as to waste its skills and almost assure that it will not continue to occupy a significant place in the system. Present court procedures are retained. But these are sometimes regarded as over elaborate even under the present system and are clearly inappropriate in a large proportion of cases under the proposed system.

It shifts costs from wrongdoers to the innocent. For an economically unimportant saving in premium dollars, plus the certainty of a modest payment, needed or not, policyholders are required to give up the right to collect from the wrongdoer for the damage he causes to their own cars and also to give up their opportunity for an adequate award if they are severely injured. They give up what they can't afford to surrender for a saving they do not really need, and for a payment that may be too small to matter.

It forces innocent participants in collisions to absorb their own losses directly or through insurance they buy to spread over a period of time the cost of their own losses. They are not permitted to maintain a suit against the other party to the collision.

It charges residents of a state with the cost of paying benefits to non-resident, even when the non-resident is at fault.

Its benefits are grossly inadequate in all serious cases. Those who lose the most are the severely injured innocent victims. Those who gain the most are the irresponsible.

We recommend that proposals that would severely reduce benefits payable to persons injured in automobile accidents or would abolish or substantially abolish the tort basis for the automobile accident reparations system, such as the Keeton-O'Connell Basic Protection Plan and the "Complete Automobile Protection Plan" announced by the American Insurance Association, be opposed.¹⁸

18

This recommendation was made as part of the Report of the Special Committee on Automobile Accident Reparations submitted to the House of Delegates of the American Bar Association on January 27, 1969 and adopted by action of the House at that time.

The International Association of Insurance Counsel at its midwinter meeting in 1969 approved this recommendation and applauded the action of the House of Delegates in respect to it. Professor Herbert S. Denenberg sharply criticized the A.I.A. plan at the spring, 1969 meeting of the Society of Chartered Property and Casualty Underwriters. He stated the plan offered "no reasons whatever for most of its basic assumptions" and that "it is based on five principles...four of these are unsound."

C. The Cotter Plan

In January of 1969 the Connecticut Insurance Department proposed to that state's legislature a program to reform the present system of automobile insurance and accident benefits. It is called the Cotter plan after William R. Cotter, who is Commissioner of Insurance of Connecticut.¹⁹

The program, it is said, "represents an accommodation of views on which all elements of the automobile insurance industry--now widely divided--could reconcile their differences." The hope was expressed that the program could serve "as a rallying ground for all viewpoints."

The plan consists of ten separate proposals, expressed in 12 legislative bills, any one or more of which could be enacted or not without regard to what might happen to the others. Thus, it is not a "plan" in the same sense as the basic protection plan, the A.I.A. plan or the Ehrenzweig plan, which embody some particular central idea upon which the plan depends.

We take no position regarding two of the proposals as outside the scope of our assignment. These are: No. 7, which would adopt a new rate regulatory law, and No. 10, which imposes restrictions on the right of cancellation. Two of the other proposals are somewhat similar to proposals we have made. These are: No. 3, that the doctrine of comparative negligence be adopted, along with a special verdict procedure, and that provision be made for contribution among joint tort feasons, and No. 6, which seeks to promote advance payments and prompt settlement of property damage claims by making clear that the payments do not constitute admissions of liability.

Tax Set-off

One proposal (No. 8) is that damages for past earnings and anticipated future earnings be computed net of income taxes and that, absent proof of a smaller set-off for prospective taxes, the set-off shall be 15 per cent of the amount of lost future earnings. While this proposal is aimed, as one of ours is, at correcting a particular failure of the law of damages to adjust itself to modern conditions, it differs from our proposal in two respects. Our proposal, having in mind that the entire award, not just the part that compensates for past and prospective earnings, is free of tax, would instruct the jury of this fact. And we do not name a specific percentage off-set to be employed in the absence of proof of a smaller figure.

¹⁹ During the last week of May the Judiciary Committee of the Connecticut Legislature reported unfavorably on the Cotter plan. The Committee is advised that a similar plan was introduced in the Illinois Legislature and that Ohio will be considering such a plan.

One of the reasons that a change to adjust the law to the tax facts of life has been so long delayed is the fear that it would cause too much confusion and would prolong trials with detailed testimony of past tax status and of the necessarily speculative future tax status of the claimant. Use of a specific limited off-set, unless there is proof of a smaller off-set will encourage the very type of complex testimony that the present rule seeks to avoid. It seems less desirable than using a simple cautionary instruction. Moreover, to confine the off-set to wage losses introduces an element of unreason in the law of damages. The underlying purpose to be served is to make sure that the jury does not proceed to arrive at the verdict under the mistaken impression that an award is subject to income tax. It is not consistent to seek to assure that the wage-loss part of the verdict is rendered on a net basis and deliberately to fail to instruct that the amount included for pain and suffering is also free of tax.

Regulation of Contingent Fees

Proposal No. 5 would limit contingent fees to 25 per cent and would authorize any court in the state to adopt rules prescribing smaller but graduated contingent fees, but would permit larger fees if allowed by the court. It would also require the filing of closing statements.

Our position on contingent fees differs in several respects from this proposal. One interesting aspect of the Connecticut fee proposal is that it does not evidence any consideration of how it interrelates with the other proposals, especially No. 1 (no fault benefits) and No. 4 (limitation on damages for pain and suffering), but rather would seem to presuppose a continuation of the present rules of damages. If, as under the Cotter plan, a substantial band of no fault benefits is to be introduced and damages for pain and suffering are to be severely limited, something more sophisticated than a simple limitation to 25 per cent, plus disclosure, may be needed to come to grips with the question of how lawyers should be compensated under the new conditions.

Fraud

Proposal No. 9 would impose "stiffer penalties for fraud" and would also require the cooperation of the claimant for physical examinations and other matters. It seems unobjectionable in principle. But we believe most states now have laws and rules adequate to deal with these problems.

Three highly controversial proposals remain for discussion. Any one of these, if adopted in the form presented, would have a major impact on the present system. They are: No. 2, small claims arbitration; No. 1, no fault benefits; and No. 4, standards for pain and suffering awards.

Arbitration

This proposal is that claims not exceeding \$3,000 be arbitrated. We shall refrain from discussion of the extreme generality of the proposed statute. Some vital matters are wide open, for example, what the cost of appeal will be, how the arbitrators are to be selected, how the "amount in controversy" is to be determined.

Our general attitude toward mandatory arbitration of tort claims is stated in an earlier portion of our report. We do not favor mandatory arbitration. At a time when the main thrust of the effort to cope with delay in the courts ought to be to strengthen and enlarge the courts so that they can deal efficiently, promptly and justly with the increasing amount of judicial business, and at a time when the problem of delay is yielding under the impact of orthodox methods, it is a step in the wrong direction for the courts to be deprived of a substantial area of their jurisdiction.

The size of the area of potential deprivation (perhaps abdication is a better word, since the court will define the area) is shockingly large. In Connecticut, we are informed, 90 per cent of all auto claims do not have a final settlement or verdict in excess of \$3,000. Whatever sort of screening process is used will be imperfect. Still it would seem that, unless merely naming an ad damnum in excess of \$3,000 is to take the case out of the arbitration system, the impact of the proposal could be to absorb something like 75 per cent of all auto tort cases. If the damage limitation and the comparative negligence proposals were to be adopted, the impact would be even greater.

Possibly the presence of a desperate condition as respects delay, coupled with a near hopeless prospect for improvement, would furnish at least a pragmatically solid reason for introducing mandatory arbitration on a substantial scale. But this is not now the situation in Connecticut, although perhaps it was in the recent past. During the 1965 session and again during the 1967 session the state's legislature took significant steps to alleviate court congestion -- including the addition of 13 judges to the Superior Court, four to the Court of Common Pleas. It also provided for: continuous sessions; increased the membership of the supreme court from five to six; and a chief court administrator. As a result, the most recent report of the Judicial Council of Connecticut, the Twenty-first Report, issued in December of 1968, shows that in each of these years more cases were disposed of than were entered in both the superior court and the court of common pleas. This is the first time that the docket of the superior court has declined in two successive years for more than 25 years. Moreover, the size of the decline was greater (3,257) in the second year than it was in the first (1,600) and this in the face of an increase in new cases.

In the superior court on the jury side, there also has been a decline in the average waiting time (the time between the date claimed for trial, which can only be after joinder of issue, and trial) to 16.4 months. The number of court cases pending on the trial list in the superior court declined as follows, as shown by figures from page 32 of the Twenty-first Report of the Connecticut Judicial Council:

	Sept. 1965	Sept. 1966	Sept. 1967	Sept. 1968
Jury Court	11,665 <u>2,715</u>	9,339 <u>2,578</u>	8,376 <u>2,250</u>	7,096 <u>2,044</u>
Totals	14,380	11,917	10,626	9,140

It would appear that Connecticut is well along the road toward eliminating the delay problem. There is every hope that progress will continue.

A conclusion that compulsory arbitration, since it appears to be generally regarded as successful in Philadelphia, will bear transplanting to Connecticut is not one to be drawn without much more analysis than has been presented. In any event, if a radical approach can be justified at all, it should be limited carefully to cases much smaller in size than "\$3,000 or less". The means of applying the limitation, of selecting and paying the arbitrators, whether the appeal results in a trial de novo, the costs of the appeal and whether they are recoverable as taxed costs--should all be worked out in advance and submitted to the scrutiny of the Bar and the public.

No Fault Benefits

This proposal is that every automobile liability insurance policy covering a private passenger motor vehicle, must provide medical, hospital and disability benefits to the insured, to household members of his family, to guest passengers and to pedestrians allegedly injured by the vehicle.

The required amount is \$2,000--aggregate--for medical and hospital expenses and, as to disability benefits, 85 per cent of loss of income from work, subject to a maximum of \$500 per month for 52 weeks--\$6,000. The disability benefits are subject to a waiting period of 30 days. We shall not discuss the disability coverage separately beyond pointing out that the 30-day waiting period will serve to prevent approximately 80 per cent of the cases from receiving any payments under this part of the coverage.

As respects guest passengers and pedestrians, the benefits may be excess over collateral benefits. This will mean that at the beginning, in the great majority of instances, no benefits will be paid to such claimants so prevalent are the benefits they have provided for themselves. In the not so long run, however, it may be anticipated that if this proposal should be adopted, the providers of collateral benefits will exclude from their coverage injuries sustained in automobile accidents. Thus the attempt to hold down the cost of the proposed benefits by making them excess will likely be unsuccessful and have as a net effect the narrowing of the coverage now provided by the accident and health insurers and others.

The amount of benefits received under this proposed coverage must be subtracted from any award recovered in a tort action against a wrongdoer. Thus the policyholder (initially, at least) bears part of the cost of an accident in which someone else may be wholly to blame. The defendant is (initially, at least) given the benefit of benefits provided at the expense of the policyholder.

This coverage is responsive to the feeling, apparently held by many people, that some way should be found to make certain that no victim of an automobile accident, except those flagrantly at fault, should go wholly uncompensated. Assuming for the moment that there should be some response to this feeling, and that the benefits should be medical and hospital benefits, or at least measured by the size of the medical and hospital bills, a policy question of the greatest importance is presented. Should these benefits be provided on a first-party or third-party basis? The Connecticut proposal selects the first-party idea. We are of the opinion that selecting the first-party approach is a serious mistake.

From the point of view of those who wish to preserve the tort system, it is better to continue to have the injured person look to the other party instead of being forced to provide accident and health benefits for himself at his own expense. The tort system is a third-party system. Even if there is an evolution toward having the defendant pay some benefits on a strict liability basis to those injured by him, it would be better to continue to hold him responsible rather than to switch to a basis under which the injured policyholder must provide benefits for himself. The tort concept is not destroyed if the defendant's duty toward the plaintiff is determined by stricter rules than at present. It is destroyed if the burden is lifted from the tortfeasor and placed on the injured person himself. That is the road toward abolishing the tort concept. The other is the way of retaining it.

The American Insurance Association plan would place the entire system on a first-party basis. We oppose it. The Keeton-O'Connell plan would place a large part of the system on a first-party basis. We oppose it. Both of the plans are destructive of the tort system--one totally and the other in large part. Can this part of the Connecticut proposal be distinguished in principle? We think not.

Apart from principle, the introduction of the concept of compulsory first-party coverage (rather than compulsory liability coverage) brings with it an undesirable degree of inefficiency. The injured person should not have to pursue two courses to collect his due--one against his own insurer and the other against the insurer of the other party. He should be able to look to a single source and not be required to pursue two sources. If the liability carrier is to have the ultimate responsibility for paying the final judgment, it should also have the full responsibility for investigating and adjusting the entire claim.

Under this proposal, each case would have to be investigated as to the same medical expense and loss of income by the policyholder's company and by the company insuring the other car. In effect, two settlement questions are involved each time: (1) the first-party case, and (2) the third-party case. After that, the insurers fight it out among themselves, independently of the court proceedings.

The most recent text on casualty insurance (Kulp & Hall) has the following statement (page 531) on the advantages of placing the no-fault benefits on a third-party basis:

"There is logic to having both the basic protection and the optional liability coverage in one insurer, and there could be major savings because liability insurers would know immediately of accidents that might potentially involve the liability coverage. Investigation would be triggered early in order to provide an adequate defense for the insured. Further, to the extent that investigation with regard to basic protection and the third party liability coverage would overlap there would be a saving."

Unlike the present voluntary standard medical payments coverage, under which the benefits may be retained by the named insured regardless of the third-party action, the Connecticut proposal substitutes (in part) compulsory direct first-party benefits for the tort action. If the concept were expanded, we would have in effect a mandatory accident and health system, like the A.I.A. plan.

Such a system has been viewed with deep concern because, if the idea of requiring people to take care of their own losses at their own expense is accepted, there is no natural stopping place en route toward a total first-party approach. The logical outcome is a social security type of system, one in which (1) everyone injured is entitled to benefits as a matter of right; (2) fault not a criteria; and (3) rating is on the basis of how much one is likely to collect rather than on the likelihood of the policyholder causing, by his negligence, payments to be made to third parties. These concerns strike even deeper if the state requiring first-party benefits in every automobile liability policy does not require liability insurance. This proposal is not so much to improve a liability based system by mitigating its harsh results as it is to choose an accident and health based system in preference to a liability system.

Another aspect of the Cotter plan is that each insurance company must agree that if its insured is liable, it will reimburse the company that paid the no-fault benefits. Inter-company disputes are resolved by arbitration.

It must be conceded that this proposal is responsive to the problem of the uncompensated victim. But it is responsive in the same sense that a proposal for compulsory accident and health coverage would be. It would be more responsive if liability insurance were also compulsory. Our own recommendations respecting the problem of the uncompensated victim is to continue as the base a liberalized liability system, to support it by compulsory liability insurance and to recommend a study of the feasibility of superimposing a modest medical benefit system on a cross over basis.

Our recommendations are more consistent with the central idea of improving and preserving the present system than is the introduction of compulsory accident and health insurance. The cross over medical plan is less wasteful of the claims investigatory facilities of the insurers than this part of the Cotter Proposal. We believe that the cross over medical plan satisfies this criterion better than this part of the Cotter plan does.

Standards for Limiting Pain and Suffering Awards

The proposal would limit the damages recoverable for pain, suffering and inconvenience in motor vehicle accident cases. A claimant who incurs medical and hospital expense not over \$500 cannot recover for "pain, suffering and inconvenience" more than \$250, i.e., 50 per cent of his medical and hospital expense. The impact of this limitation is very great because, at present, nearly 80 per cent of all automobile bodily injury cases would be affected.

Assuming clear liability, it is not unusual for a bodily injury case to be settled for a sum which is three times the "specials". Thus, under today's customs a case developing \$500 in medical expense (no wage loss) might well be valued, for settlement purposes, at some such amount as \$1,500. Under this part of the Cotter proposal, such cases would be valued at \$750. We are not arguing that these amounts are right or wrong, but we do submit that the impact would be great.

A claimant who incurs \$600 in "medical" cannot recover for "pain, suffering and inconvenience" more than 50 per cent of the first \$500 (\$250) plus 100 per cent of the "medical" in excess of \$500--in this illustration, \$100. There would be a total recovery for pain and suffering of \$350 for an over-all total of \$600 plus \$250 plus \$100, i.e., \$950. Under today's customs, such cases may be valued at some such amount as \$1,800.

The purely hypothetical "multiple" used in these illustrations is three times specials. These estimates may or may not be realistic for so-called good liability cases in Connecticut, but they are used for purposes of illustration. Cases of this size would almost certainly have

additional specials. Their presence would increase the over-all settlement value of the case.

It is abundantly clear that if this part of the Cotter plan were to be adopted without other offsetting changes, settlement and verdict values would be diminished sharply -- perhaps as much as 50 per cent. However, there is some uncertainty as to whether the limitations would actually operate well in practice because in cases of death, permanent disfigurement, loss of a bodily member, permanent loss of a bodily function and other exceptional circumstances, a court or jury may exceed the standards set by the statute. To what extent this "out" would be used is difficult to predict.

It has been established that small cases command an artificially high settlement value. We believe that efforts to rid the system of these excessive settlement costs should be made. This part of the Cotter plan is responsive to the need to avoid having too many overcompensated claimants. We suggest that the Cotter proposal may have gone too far, especially in placing such a large percentage of cases in the group in which pain and suffering damages are limited to 50 per cent of the medical. Once the \$500 threshold has been crossed, every extra dollar in medical expense results in increasing the potential settlement or verdict value of the case by a multiple of two. If the medical is in effect guaranteed, as under the no-fault benefits, or even if it is not, it is easy to picture an unsatisfactory state of affairs in the "building" of cases.

The part of our report which deals with the need to do something to rid small case settlements of the artificial nuisance value recommends a study, by all interested persons of what we termed the "Quick Settlement Option Plan".

Conclusion

As is clear from our discussion, we refrain from comment as to some of the Cotter proposals. Some we favor; some we oppose. As to certain of the proposed solutions, we believe that more desirable alternatives are available. Further study of the interrelationship of the several Cotter proposals and their over-all effect is needed and reasonably precise cost data should be supplied.

4. Other Proposals

It is difficult to select from a large number of proposals for change those that should be the subject of comment in this report. We have made our choices for various reasons, and our comments will probably indicate what they are.

A. The Guaranteed Benefits Program of the American Mutual Insurance Alliance.²⁰

This proposal or experiment is being participated in by several companies, including some non-member stock companies. If the experiment is successful, we would expect the plan to be presented in the form of a proposal for general adoption.

The program is that injured persons (unless flagrant offenders, such as hit-and-run drivers) are offered certain benefits regardless of fault. These are (1) medical benefits up to \$5,000; (2) disability benefits, at 70 per cent of wages, for up to 12 months, but not over \$7,500; (3) at the end of the period of disability payments, a benefit for pain and suffering in a lump sum, which is 50 per cent of what has been paid as disability benefits; (4) a lump sum, based on a percentage of \$7,500 for permanent impairment, the percentage to be determined from a set of guidelines. Payments made under (3) above are deducted from this payment; (5) survivors loss benefits in the amount of \$5,000.

The aggregate total that may be paid is limited to \$12,500 -- \$5,000 under medical and \$7,500 under any one or a combination of other categories.

There is also a provision, not described in detail here, as to loss of service benefits.

The medical benefits are not merely offered. They are payable without regard to fault. The other benefits are paid only if the claimant elects to receive them in lieu of pursuing his legal remedy. If these benefits (i.e., other than medical) are rejected, the claimant is free to pursue his tort action. If they are accepted, that ends the case.

Among other things, the experiment, it is hoped, will provide solid information as to how many injured persons will accept limited benefits in lieu of proceeding to negotiate or sue under tort rules. Obviously, all those having "no liability" claims will do so, and this will mean that they will receive more than they do now. Whether enough other people will also accept the limited benefits to hold over-all costs within acceptable limits is the crucial question.

²⁰ The members of this organization write about 12 per cent of the automobile liability insurance in the United States.

The plan does not destroy the tort law. It may make resort to it less frequent. Collateral source benefits are not subtracted, except that benefits under automobile medical payments coverage are paid first and the limit of \$5,000 of "guaranteed" benefits is reduced.

In two car accidents the driver's claim, including his claim for medical benefits, is adjusted by the other insurer, not the insurer of his car (i.e. medical payments are on a cross over basis).

There is no reason for us to take any position at this time on this experiment, other than to note our interest. We have some misgivings as to whether its results will be the same under full actual use as under test conditions and as to the wisdom of such a generous scale of benefits to those at fault. We are pleased that such an effort to test public desires is being made. We wish that field tests could be made of all far-reaching proposals before they are advocated for general adoption.

B. The Columbia Plan

We select this 1932 proposal for comment even though interest in it is now mostly a matter of not being unaware of the history of the efforts to change the tort system. There is some value in noting how unsatisfactory such a plan, even though devised and supported by an impressive group of scholarly people, can look in retrospect and how conditions that were pointed to at the time as calling for a great change can themselves change so much as to destroy the validity of the original conclusions.

The plan was based upon the Columbia Report published in 1932. It surveyed the workings of the tort system in relationship to automobile cases from the viewpoint of the victim. From such a standpoint, the results were shocking. Only when liability insurance was in effect did the injured person have much of a chance to recover anything at all. When insurance was in effect some payment was made in 87 percent of the serious cases, and 78.7 percent of the total number of persons receiving some payment were involved in accidents with insured cars.²¹

But only about 30 percent of motorists were insured and the other sources so widely available today (Blue Cross, wage continuation plans, etc.) were simply not in existence. This meant that most victims received nothing at all. No wonder that Arthur A. Ballantine, chairman of the Columbia Committee, was moved to say, "The trouble with the common law method of dealing with these injuries is not its philosophy but its futility".²²

²¹ Report of the Joint Legislative Committee, New York, Legislative Document No. 91, at 196 (1938). A 1951 study cited in KEETON AND O'CONNEL 40 showed that when there was insurance, some payment was made in 95 percent of the cases involving serious injury.

²² Address before the American Management Association, May 24, 1937.

The committee tried to change this futility by proposing a constitutional amendment and a workmen's compensation type of statute.²³ Insurance was to be compulsory. The defendant's policy paid the benefits: medical expense (an early example of 3rd party, i.e., "cross over" medical benefits on a strict liability basis), two-thirds of wages with a maximum payment of \$25 per week up to \$5,000, \$3,500 (maximum) for disfigurement. Permanently unemployed persons were assumed to have a wage of \$8.00. Housewives were deemed to have a wage of the amount usually paid for similar work. Administration was to be by a board. No subtraction for collateral benefits was provided for except of relief payments from governmental sources to which the injured man had made no direct contribution. Insurance would cost about half again as much as the then Massachusetts rates for compulsory insurance. Victims of one-car accidents did not recover. There was no insolvency protection and no hit-and-run protection. Nonresidents were liable for compensation but didn't have to insure. Property damage was not in the plan.

Looking back, one wonders why so many crudities and inequities were accepted by the authors of the plan. Perhaps once the fixed schedule idea was accepted, with all of its inherent injustices, the other features could be taken in stride.

The plan was considered in New York, Connecticut, Wisconsin and Virginia. Of course, it didn't pass. Yet we should not regard the Ballantine Committee and their helpers from Yale as having engaged in a futile effort. They succeeded in directing attention to the significance of liability insurance as a means of protecting the victim in a more forceful way than ever before. Although the insurance lobby opposed compulsory insurance laws, it supported financial responsibility laws and they multiplied. The old ratio (about 30 per cent) of insurance went up to perhaps 85 percent -- higher in some places -- and the Columbia Report supplied some of the arguments and the data in support of these laws and in support of compulsory insurance laws in New York and North Carolina.

So, it would seem, the best reason the framers of the Columbia Report had for making a proposal for drastic change -- lack of liability insurance and the consequent lack of ability to recover damages -- has almost disappeared. Their contribution to that result, though unplanned by them, is nevertheless important. If the recommendations of this report are followed, this reason will disappear totally and with it the futility that impressed Mr. Ballantine.

C. The Conard Plan

The Conard plan is stated in a law review article by Professor Alfred E. Conard of the Law School of the University of Michigan.²⁴ It commands

²³ The constitutional amendment and statute are in the Report of the Joint Legislative Committee, supra note 16, at 79 and 81 respectively.

²⁴ The Economic Treatment of Automobile Injuries, 63 MICH.L.REV. 279, (1964).

attention because it is an attempt to utilize, in devising a proposal for change, the wealth of empirical data recently available. Of this, the richest lode is the Michigan study²⁵ with which Professor Conard was associated and for which he made the original plan. Its emphasis is on the problems of the injured and the correlation of benefits from various sources. It proposes a plurality of programs:

1. Rehabilitation, both medical and vocational, for all victims.
2. Subsistence, under an extension of the Social Security system, to all victims and their dependents.
3. Income maintenance, at some fraction of wages but not over the national average wage, for wage earner victims on a lifetime basis, if necessary. This would come from a fund, operated by the government or by a private monopoly involving participation by insurance companies. The fund would be created by a tax on automobile owners or drivers on a basis which considered accident frequencies.
4. Tort damage would be recoverable, but amounts received under the other programs would be deducted.
5. The element of personal detriment to the defendant would be retained by excluding from insurance coverages punitive and "psychic" (non economic) damages, and by not permitting unconditional discharge in bankruptcy. Policyholders previously involved in accidents would pay more regardless of actuarial support.
6. Litigation costs would be assessed against the party who rejects reasonable settlement offers.

An important omission, passing the questions of flaws in the data and whether the universe used (State of Michigan) was well chosen, is the absence of attention to the practical problems of making such vast changes. This includes the problem of securing wide agreement that they should be made. To be sure, existing programs are kept alive, but in the correlation operation many changes occur. It would hardly be correct to regard this plan as evolutionary.

No cost estimates are presented.

²⁵ CONARD, MORGAN, PRATT, VOLTZ & BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS (1964). For the Pennsylvania survey, see Morris and Paul, The Financial Impact of Automobile Accidents, 110 U.P.A.L. REV. 913 (1962), reprinted in DOLLARS, DELAY, AND THE AUTOMOBILE VICTIM, 3 (1968). For a 1955 New Jersey survey, see A Comparative Analysis of Costs of Insuring Against Losses Due to Automobile Accidents -- New Jersey, 1955, ECONOMICS AND BUSINESS BULLETIN, TEMPLE UNIV., March, 1960.

D. The Saskatchewan Plan

We include comments on this plan notwithstanding the great differences between Saskatchewan and most of the United States in respect to population density, number of automobiles, traffic conditions, habits in respect to claims, etc. In the United States and Canada, it is the only system in operation that is based mainly on the no fault concept.

Almost all victims are paid the benefits specified in the schedules. The payment to a totally disabled person is \$25 per week up to 104 weeks. The death benefit is \$5,000 for the primary dependent and \$1,000 for each secondary dependent up to five. These accident benefits plus "physical damage insurance" (collision, fire, theft) on the vehicle must be purchased, and the fee is part of the driver's license charge. These benefits are paid by a government insurance office. But injured people still have their tort claims, and liability insurance is compulsory at a combined (bodily injury and property damage) limit of \$35,000.

The accident (first-party) benefits are deducted from the tort recovery. Medical expense is paid as part of the government's social insurance coverage. Higher limits of liability coverage and higher accident insurance limits may be purchased from private companies. The government insurance office also sells excess limits liability coverage.

Eliminating the complexities created by the relationships between government insurance and private insurance, and assuming an all-private insurance basis, this type of plan in the United States would simply amount to compulsory low-benefit personal accident and physical damage insurance plus compulsory liability insurance with credit on judgments for the accident benefits. The problem here would be whether the added cost of paying the no fault benefits to those who did not have valid negligence claims would be acceptable.²⁶

E. California Plans -- Report of the Committee on Personal Injury Claims of the California State Bar

This 1965 Committee report (never adopted by the State Bar of California) is selected for comment chiefly because of its source and because of the comprehensive scope of the 70-page report.²⁷ The report states: "The committee has not been unanimous with respect to any of the major questions involved, save one: No member favors the establishment of an automobile accident commission. No clear majority has developed concerning the central policy issue".

With "virtual unanimity" it was agreed (Section 22) that it would be desirable "in order to take care of such social problem of uncom-

²⁶ ROKES, COMPENDIUM OF AUTOMOBILE INDEMNIFICATION PROPOSALS, at P.26. has a brief description of the plan. For some comments on it, see KEETON & O'CONNELL 140.

²⁷ 40 J.ST.B. CALIF. 148 (1965).

pensated victims as does exist" to require a Saskatchewan type plan, presumably on an all private insurance basis. This "basic" coverage on a no fault basis and apparently (but this is not clear) on a first-party basis would be compulsory. It would pay medical benefits and benefits for economic loss to the insured and to occupants in his vehicle. Pedestrians receive medical benefits only. The right to proceed with the tort claim is not impaired, but from any tort settlement the no fault benefit is substracted. Liability insurance is made compulsory and medical payments coverage mandatory.

The report is not specific as to limits. It was stated that "our recommendations assume that it will be found that such coverages are available at a feasible cost." Apparently, no specific effort was made to determine what the cost would be. Adding substantial no fault benefits and increasing required limits of liability would mean a substantial increase in insurance costs.

Two years later a committee (the Financial Responsibility Study Committee of the California Department of Motor Vehicles) reported a plan which required medical payments, disability insurance and liability insurance. Acceptance of the no fault benefit waived the tort claim.

The earlier history of such proposals in California is of interest. Governor Edmund G. Brown included in his inaugural message of January 5, 1959, a comment that "the time has come for us to weigh the wisdom of an automobile accident commission...". Governor Brown appointed Stanley A. Weigel of San Francisco to make a survey and report. This was released in June, 1959.

The Weigel report is an interesting document. It did not contain a recommendation for or against an automobile accident commission. It did point out the need for research and to weigh the wisdom of any plans for change. The appendix contains many statistical summaries, mostly from the files of the California Highway Patrol, and a selective, annotated bibliography of previous proposals, some made many years ago, and commentaries on such proposals.

The subject attracted attention among lawyers and judges throughout the country. The Automobile Insurance Law Committee of the Insurance, Negligence and Compensation Law Section of the American Bar Association appointed a committee under the chairmanship of FitzGerald Ames, Sr., of the California Bar to make a study. In due course, this committee submitted its 130-page report dated September 1, 1960. It vigorously condemned, on numerous grounds, the whole idea of a compensation type plan for automobile accident cases. On August 3, 1960, this report was presented to the Automobile Insurance Law Committee of the American Bar Association Section of Insurance, Negligence, and Compensation Law. It was unanimously approved.

F. Inverse Liability

The inverse liability automobile accident insurance proposal was presented by J.B.M. Murray at the May, 1967, meeting of the Casualty

Actuarial Society.²⁸

In essence the proposal is that every motorist should buy a form of accident insurance which would pay, without regard to fault, the insured (and his dependent relatives living with him) compensation for "economic loss" suffered because of bodily injury received in an automobile accident. Collateral source benefits are excluded. The policyholder would elect whether to sue the third party. If he makes such an election, he forfeits his benefits under the inverse liability policy. If he takes the no-fault benefits, the insurance company takes over the insured's right of recovery and pursues it against the third party. If this action produces a recovery in excess of the no-fault benefits, the excess belongs to the insured.

This plan, or any plan that grants benefits on a no-fault basis, thus bringing in a substantial number of new beneficiaries, will increase insurance costs unless offsets are provided either in the form of decreases in amounts of benefits, in services, or in overhead costs.

G. National Compensation Plan for Automobile Accident Cases

Samuel H. Hofstadter, Justice of the Supreme Court of New York, and Robert Presner, have proposed this plan.²⁹ It is an extension of earlier proposals of Justice Hofstadter. Its premise is that the federal government is now inextricably involved in automobile accident prevention and that the automobile is so entwined in the stream of interstate commerce that "constitutionally as well as pragmatically federal action is warranted."

A federal highway compensation statute, similar to a workmen's compensation act, is proposed under which all persons injured in automobile accidents would be indemnified for all "actual loss". Apparently this would mean medical bills and out-of-pocket expenses, plus payments for temporary disability in an amount representing the difference between the income they normally earned and that actually received during incapacity.

Permanent disability would be paid for by measuring the actual effect the particular injury has on the claimant's earning power. None of the details are spelled out.

The authors of this plan are critical of the Keeton-O'Connell plan. As to it they comment:

"Like all compromises, this one with the promise of something for everyone, will please no one. It is too complicated and cumbersome. It will

²⁸ Mr. Murray is casualty superintendent of the Prudential Assurance Company, Ltd. In Canada this company writes about \$5,000,000 in annual direct automobile liability premiums.

²⁹ 22 RECORD OF N.Y.C.B.A. (1967).

succeed only on paper. Instead of reducing litigation, it will encourage claimants to increase their demands for pain and suffering to the amount which will give them a day in court. And if their out-of-pocket expenses exceed \$10,000, they will have to absorb the additional loss or litigate it under traditional common law concepts and procedures. Chances are that the more serious injuries will still be undercompensated".

H. The "Moynihan Plan"

The "Moynihan plan" is stated in the article "A New Automobile Insurance Policy" in the New York Times Magazine of August 27, 1967. It has been widely reprinted, including Trial for October-November, 1967, and Road and Track for February, 1968.

Actually it is not a plan. At the time of this article Daniel P. Moynihan, Ph.D., was Director of the Joint Center for Urban Studies of M.I.T. and Harvard. His "plan" is stated in the form of a passing comment made in the course of an article that challenges the bar and the insurance companies to involve themselves in a responsible way in the solution of the automobile problem.

That the present state of affairs must change is presupposed. On that premise, Dr. Moynihan sees two alternatives. One, for the insurance industry to get out of the "traffic accident business" and for the government to take over. Thus the needed reforms would be accomplished, or, alternatively, for the industry to reform itself. The Keeton-O'Connell route is viewed as a way for the industry to do this, and he calls the Keeton-O'Connell proposal "simplicity itself".

The Comment is made that the simple way for the government to take over would be for the government to provide automatically all licensed drivers with insurance against injuries and property loss that they might suffer -- regardless of fault. Financing might be via using some of the tax money originally intended for the interstate highway system, but which may not be used for that purpose, plus an extra "penny or so" on the gasoline tax.

The dislocations inherent in abolishing a \$10,000,000,000 segment of the insurance industry are dismissed with the remark that some orderly transition could be arranged for those "generally speaking valuable workers".

I. Ehrenzweig's Full Aid Insurance Plan

In 1954 Professor Albert Ehrenzweig proposed "full-aid insurance",³⁰ the principal features of which are: Any owner or operator who

³⁰ 43 CALIF. L. REV. 1 (1954). Commented on in KEETON & O'CONNELL, 165.

voluntarily carries "full-aid insurance" up to a specified minimum would be relieved of common law tort liability for criminal negligence; any person, except members of the family of the insured, injured by an automobile not so insured, would be entitled to recover from a fund supported by tax sources, plus "tort fines" collected from drivers whose criminal negligence has contributed to an injury. Any victim claiming recovery from the fund would assign to it his tort cause of action.

J. Green's Comprehensive Loss Insurance

In 1958 Professor Leon Green published his book Traffic Victims: Tort Law and Insurance. He proposes compulsory comprehensive loss insurance for every vehicle. Failure to insure was to be a felony. The insurance coverage would inure to every person injured through the use of the automobile. He would eliminate damages for pain and suffering and have claims administered by the court, under a simplified procedure, without a jury.³¹

K. Should we insure the driver instead of the car?

Most discussions, including our own, of ways and means of improving the present system, include the subject of insuring the driver instead of the car. The idea is an old one. As long ago as 1915 this type of policy was on the market in at least one state, Massachusetts. In 1920 it was replaced in Massachusetts by the present system of issuing policies on a specified car basis. Today the usual form of policy provides that, with respect to the owned automobile (i.e., the one described in the policy) not only is the named insured an insured but also any resident of the same household and any other person using such automobile with the permission of the named insured.

The present concept is not precisely that of "insuring the car" but rather that of insuring those individuals who make up the household and those who use the car in accordance with the permission of its owner.

It is argued that a change back to the "insure the driver" idea (i.e., insure only the person named in the policy) would be more consistent with the idea that only those at fault should be required to pay damages to injured persons; that underwriting (selection of those to be granted insurance) could proceed in a more surefooted manner because the person making the underwriting decision has an easier task when he need evaluate only a single driver instead of an entire family plus occasional strangers; that licensing could and should be controlled by the accident record of the applicant and that it is easier and neater to combine the insurance policy with the driver's license; that the new policy form would be easier to read than present forms; and finally that since the number of persons buying insurance and paying premiums would expand, the individual's bill for insurance would be significantly less than at present.

³¹ Commented on in KEETON & O'CONNELL 159-165. See also Section II of this report.

One of the leading proponents of the idea believes that, in order to make the concept workable, insurance of the driver would have to be a prerequisite to receiving a driver's license, that the license should be coterminus with the policy, and that if the insurance is cancelled the license should automatically be cancelled and vice versa. He suggests that the way to get started on the new concept would be for some state now having compulsory insurance to amend its law to embody the new concept.³² The model policy form suggested is not one that could be certified as "future proof" under existing financial responsibility laws.

The pertinent question is not whether things would be better if the "insure the driver" concept had prevailed, but whether there is any reasonable likelihood that the change could be made now that the system has grown up on another basis.

The matter was studied by a legislative commission in 1959 in Massachusetts, one of the states in which bodily injury insurance is compulsory. At that time a calculation was made showing that by spreading the cost over the 613,000 additional people who would have been compelled to buy insurance, an individual's rate might be reduced by some 29 per cent. But, as the report of the commission noted, the total insurance cost would be increased by the added expense of processing applications, writing policies and billing 613,000 more motorists.

The commission questioned how the legislature would react when it was so well known that many families contained several drivers, using the same car, and so clear that the cost of the new plan to such families would be much higher than at present. It was also noted that under the new plan the number of uninsured persons would increase because it would no longer be possible for the police to place any reliance on the presence of the registration plate on the car as indicating that insurance was in effect. (Mr. Logan would cope with this by requiring the driver's license to be displayed in a plastic case on the windshield.)

There is additionally the problem of how to insure the liability of the non-driver owner of the car for the negligence of those driving the car with his permission. The fact that the driver has insurance covering his liability would not absolve the owner from the possibility of being held liable. Owners, certainly those who were not themselves holders of drivers' licenses, would need to buy liability insurance to protect themselves from their vicarious liability. As respects physical damage insurance, nothing by way of new simplicity is achieved.

We suspect that some problems that might arise if this plan were adopted have not yet been thoroughly studied. For example, how does it work for drivers of commercial vehicles operating interstate? Should

³² Logan, Insure the Driver, 547 INS.L.J. 682 (1968).

it apply to property damage liability also? What changes in financial responsibility laws would be needed to make them compatible with "insuring the driver"?

We are of the opinion the "insuring the driver" plan would, by adding administrative expense, have an adverse effect on aggregate insurance costs, and would make it more difficult to enforce present financial responsibility and compulsory insurance laws. It would not contribute substantially to the ability of rate makers to make equitable rates. The disadvantages more than balance any benefits from the more direct deterrence that might occur under the plan.³³

We see no likelihood that the insure the driver concept could be adopted in a substantial number of states. The fact that it would increase insurance costs for all families with more than one driver would be too great an obstacle. If this is so, it is obvious that problems will not be solved by it or by theorizing as to whether its alleged potential long-range benefits are outweighed by its immediate and visible shortcomings.

³³ KEETON & O'CONNELL 371. See American Fidelity Company v. Mahoney, 174 A. 2d 446 (Maine 1961). See also 2 1952 PROCEEDINGS OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 606; 1 1953 Id. 546; 1 1954 Id. 260; 2 1961 Id. 196.

L. Deductible provisions in automobile liability policies

Everyone is familiar with the use of deductible provisions in collision insurance. Various forms are in use. Commonly the policy provides insurance only for the amount of each loss in excess of the deductible amount.

The advantages are obvious. The premium for the insurance is significantly less than it would have been if full coverage had been purchased. The requirements as to notice, creation of records, evaluation of damages, settlement procedures, etc., are avoided as to the small claims that are clearly within the deductible amount.

In our search for ways to reduce the cost of liability insurance, and thus to offset the added costs of certain improvements which might be adopted, we have carefully considered the possible use of deductible provisions in liability policies issued to individuals.

It is argued that not only would there be an immediate reduction in premium cost but that the deterrent effect of the direct cost to the policyholder of every accident in which he was at fault would cause drivers to drive more carefully. This form of insurance, it is said, would have a beneficial effect on highway safety with consequent long-range savings in the cost of insurance.

The other side of the argument is that it is important to the smooth and satisfactory operation of the tort system that legitimate claims be disposed of with the maximum degree of promptness and with the minimum amount of bickering. Compromise is an essential ingredient in the process. Obstacles to compromise and to prompt disposition should be avoided. The presence of a deductible provision in a liability policy would create obstacles.

Often each driver involved in a multicar accident sincerely believes that the "other fellow" was to blame. These beliefs may be mistaken and not concurred in by the claims investigator of the policyholder's own company. When this nonconcurrence occurs, if the policy is written on a deductible basis, the investigator has the uphill job of convincing the policyholder that he was at fault and should hand over \$100 (or whatever the deductible amount may be) to be used as part of the payment to be made in settling the claim for which the policyholder himself denies liability. It is the legitimate claimant who would suffer under these circumstances, because the settlement of his claim would have to await not only the resolution of the question of which driver was at fault, but also the resolution of the difference of opinion between the company and its own policyholder.

Conceivably, this difficulty could be mitigated to some degree if the policy required the company to pay in the usual way and then to collect, if it could, from its policyholder. But such an arrangement would present its own set of problems. How far should the company go

in pressing its policyholder for payment? If it failed to press for payment, the hoped-for savings would not be realized. If it were provided that a state motor vehicle department should revoke the registration of the policyholder who did not pay on demand of his company, we wonder whether these added duties of being a collection agent would be cheerfully assumed and carried out by already overburdened departments? If they were carried out to the letter of the law, thousands of automobile owners would be ruled off the road, at least temporarily, in aid of insurance companies who had settled claims that the policyholder wanted to resist. We doubt that this would be tolerated.

It is apparent that any sort of a deductible provision in an automobile liability policy would involve the added time required to explain matters to policyholders and the added time and expense of collecting from the policyholder.

We do not think it would be fair, feasible or wise to, in effect, split the claim, and leave the claimant on his own to pursue the policyholder directly for the deductible amount. It is also our belief that a deductible would so hamper the settlement of cases as to induce many more lawsuits. In those suits counterclaims would be frequent, thus adding to whatever amount of court congestion already exists.

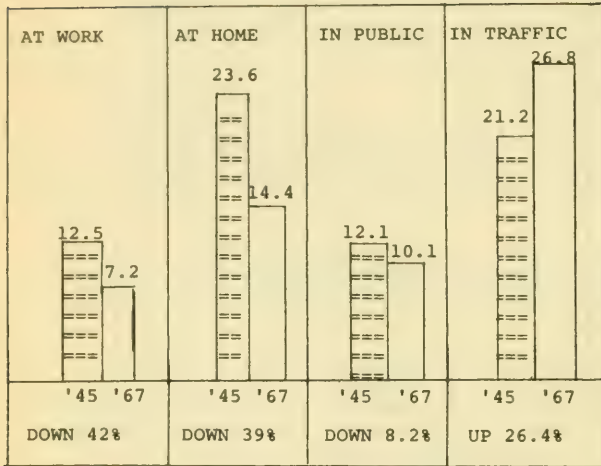
We do not believe that the widespread use of deductible provisions in automobile liability policies is likely to improve the present system. Whatever savings could be initially offered are like to be offset in part by greater expense and to be illusory in that offsetting increases in claims costs will occur. More delay will take place and more litigation will be fostered.

We wish to make clear that the reasons for our conclusion are inapplicable to collision insurance--a contract in which only the company and its policyholder are involved and in which conflicting opinions as to who was at fault play no part.

We make no assertions as to the relevancy of our conclusions as respects the use of deductible provisions in policies insuring the malpractice liability of professionals such as doctors, lawyers, architects, nor as respects automobile liability policies issued to financially responsible commercial accounts which have established their own competently staffed claim departments and are capable of making objective evaluations of claims arising from automobile accidents.³⁴

³⁴ Bureau manuals long have contained a rule allowing both bodily injury and property damage deductible insurance to be sold to commercial accounts (five or more automobiles).

VI. HIGHWAY SAFETY



U.S. SAFETY PICTURE AT A GLANCE

Jobs, Homes Safer,
Driving Worse

Vertical bars represent number
of accidental deaths per
100,000 population.

SOURCE: National Safety
Council Journal of American
Insurance, Nov-Dec, 1968.

The problem of highway safety is basic and precipitating to the other problems discussed in this report.

The increase in highway accidents and the increase in claims and lawsuits are linked inseparably. As lawyers, we are concerned with root causes and have a sense of duty to advance the general good of the community. Moreover, the stresses on the adversary system arising from the increase in accidents, claims and suits would be relieved by success in preventing highway injuries and deaths.

We applaud the efforts being made to build safer roads and safer automobiles. A major breakthrough has occurred in the invention of the collapsible steering column, and we are informed that this safety device is destined to prevent many serious injuries and to save many lives. In fact, the most recent statistics show no fatal or dangerous injuries resulting from drivers striking these new energy-absorbing steering columns, now required by federal motor vehicle safety standards, even at impact speeds up to 50 m.p.h.¹

¹ JOURNAL OF COMMERCE, May 6, 1969. It also is reported that the death rate in motorcycle accidents has declined 6.1 per cent since the issuance in 1967 of a federal standard urging the states to require motorcyclists to wear protective helmets. Previously motorcycle deaths had risen 25 per cent annually over a five-year period.

These built-in devices have the inherent advantage of being on the job constantly, regardless of the presence or absence of those having the duty of enforcing the traffic laws, or the skill, state of mind, or degree of sobriety of the operator.

One of the problems that practising lawyers have in helping the cause of highway safety is the difficulty in arriving at a sound judgment on priorities for various possible courses of action. The central facts seem to be that there are no instant remedies for highway safety, that the total research effort to date is not equal to the need, and that it is the stubborn residue of the problem that confronts us. But, as in some other fields, it is not possible simply to wait for the research to point to the certain routes to success. Action is proceeding, as it should. We can hope that at least some of it will be successful and that those who determine what is to be done will be able to establish the most effective order of priorities.

But there must be a questioning concern by the legal establishment. One study shows that of 1,147 drivers charged with killing others while "driving under the influence", only 47 went to jail, although 270 were convicted of drunken driving.² We are impressed with the reduction of highway deaths that followed the enactment and implementation of the British Road Safety Act of 1967. This act makes it an offense to drive with more than 80 milligrams of alcohol in 100 millilitres of blood in one's system. License revocation for one year is obligatory, plus stiff fines or imprisonment or both. The act introduced the compulsory breath test in England. The police have "Breathalyzer" kits³ and use them under defined circumstances. The early data showed a 13 per cent drop in fatalities, but a 44 per cent drop when the period measured was 10 p.m. to 4 a.m.⁴

As to the question of priorities, some of the responsibility has been assumed by the Federal Government. The National Traffic and Motor Vehicle Safety Act and the National Highway Safety Act were signed into law during 1966. One set the stage for government standards for auto-

2

Wake Up, America, It's Time to Stop Drivers from Killing, TRUE, Sept. 1968. For the results of drinking and driving, see also, NATIONAL SAFETY COUNCIL ACCIDENT FACTS 52 (1967 ed.).

3

This word is a trademark, but it is sometimes used to refer to breath analyzing apparatuses generally. There are other devices, for instance, "Alcometer", another trademark.

4

Addresses by Anthony Grant, member of Parliament, "Driver Behavior -- Cause and Effect", in REPORT OF THE SECOND ANNUAL TRAFFIC SAFETY RESEARCH SYMPOSIUM (1968). See also, Cramton, The Problem of the Drinking Driver, 54 A.B.A.J. 995 (1968), and Borkenstein, The Cost-Benefit Aspects of Driver Licensing, 35 INS. COUNSEL J. 559 (1968). But see Missouri Implied Consent Statutes, a pamphlet prepared by the American Bar Foundation, 1968. One of the purposes of the study was to determine the effects of adopting an implied consent law. It is stated that "The evidence of short term success of the British Program ...cannot be reliably extrapolated..."

mobiles and tires⁵, and the other, in effect, will require the states to establish highway safety programs. Section 401 of Title 23, U.S.C. directs the Secretary to assist state and local governments to increase highway safety, and Section 402 states that each state shall have a highway safety program approved by the Secretary of Transportation. The programs must be in accordance with uniform standards promulgated by the Secretary. These standards are to be aimed at improving driver performance and are to include driver education, driver testing, physical and mental examinations and licensing. They are also to be aimed at improving pedestrian performance.

The states are in the process of setting up their programs to comply. Political subdivisions of states are doing the same because the provision in Section 402(b)(C) provides that at least 40 per cent of the federal funds appropriated to the state will be expended in carrying out local programs, as approved by the governor in accordance with the uniform standards promulgated by the Secretary.⁶

The significance of this legislation is profound. For a long time the automobile industry had been attempting to deal with the safety problem by adding safety features to cars as dictated by market acceptance. When the Federal Government reacted to the publicity that automobiles were not as safe as they should be by enacting the National Traffic and Motor Vehicle Safety Act of 1966, it took upon itself the difficult task of measuring, or at least analyzing, the relative costs and benefits of devices thought to make a contribution to safety and of encouraging (even requiring) the use of those thought to be beneficial. This is no simple matter. Since the negligence law serves to define some of the costs of accidents and to allocate them among the participants, lawyers should concern themselves lest the liability system find itself accused and convicted of being a noncontributor to the cause of safety before lawyers realize what is happening.⁷

But there are still some uncomplicated and basic things practising lawyers can do. They can help to make Americans aware that driving is a privilege with certain responsibilities and sanctions. As community leaders, lawyers can be useful in supporting and interpreting the safety programs devised by the experts who have the responsibility for formulating them.

⁵ See Morris, Motor Vehicle Safety Regulation: Genesis -- LAW AND CONTEMP.PROB. (1968), and Wakefield, Safety, Smog, and the Enthusiast, ROAD AND TRACK, February, 1968, at p.28.

⁶ See Wakefield, Standards for Highways and Drivers, ROAD AND TRACK, May 1968, at p.46.

⁷ See Lave, Safety in Transportation: The Role of Government -- LAW AND CONTEMP.PROB. (1968) at p. 512.

Safety is not achieved by the enactment of laws but by obedience to them, voluntary or enforced. If it were otherwise, the great upsurge in safety legislation since the 1966 federal enactments (a chart showing what has occurred is shown at the end of this section) would have resulted in a dramatic change in the highway accident statistics. But the fact is that there were 55,000 traffic fatalities in 1968, an all-time high. Since public attitudes have much to do with the degree of enforcement, it is probably not too much of an over-simplification to assert that the public can get almost any degree of highway safety it really wants. But "wanting" is not quite enough. There must be a willingness to pay the price in terms of inconvenience and the impairment of mobility and efficiency that result from vigorous enforcement. Perhaps the public itself is ahead of its legislative representatives in its willingness to pay the price of rigorous measures to cope with the safety problem. Those desiring strong traffic laws and rigorous enforcement need to speak louder than those who complain about the harsh effects of stiff enforcement in their particular cases. Otherwise, we can hardly blame legislators for concluding that support for safety measures is not necessarily a vote-winning posture.

We do not expect that the other problems we have considered in this report are going to disappear as a result of efforts to solve the highway safety problem. But lawyers, as leaders in their communities, as persons skilled in analyzing and evaluating programs aimed at the reduction of automobile accidents and injuries, and as persons concerned with the prevention of litigation and the efficiency of the legal mechanisms for dealing with claims and suits, are still able to make useful contributions to the cause of highway safety.⁸

We recommend that lawyers study and support all wisely conceived programs aimed at the prevention of highway accidents and injuries.

⁸ A review and analysis of the available technical information on factors affecting traffic safety are available in STATE OF THE ART OF TRAFFIC SAFETY, prepared for the American Automobile Manufacturers Association, by Arthur D. Little, Ind.

KEY PROGRESS IN COMPLIANCE WITH NHSB STANDARDS AS OF END OF 1967										
State	Standard								Enabling Legislation Enacted Not Needed	
	1	3	4		5	8		11		
			a	b		a	b			
Alabama		x							x	
Alaska			x						x	
Arizona			x					x	x	
Arkansas	x	x							x	
California			x	x		x			x	
Colorado	x	x	x			x	x		x	
Connecticut		x	x		x	x	x			x
Delaware	x		x	x			x			x
Dist. of Col.	x		x	x	x		x			
Florida	x	x	x	x	x	x	x	x	x	
Georgia	x						x		x	
Hawaii	x	x	x		x	x	x		x	
Idaho	x	x	x	x		x	x		x	
Illinois	x	x	x	x	x			x	x	
Indiana	x	x	x	x	x		x		x	
Iowa			x	x		x		x	x	
Kansas		x	x	x		x	x			x
Kentucky	x						x			x
Louisiana	x		x	x						x
Maine	x	x	x	x			x			x
Maryland		x	x	x			x		x	
Massachusetts	x	x	x		x	x				x
Michigan		x	x	x	x	x	x	x	x	
Minnesota		x	x	x		x	x		x	
Mississippi	x		x							x
Missouri	x	x	x	x	x	x	x			x
Montana		x	x	x			x		x	
Nebraska	x	x	x	x	x	x	x			x
Nevada			x				x		x	
New Hampshire	x	x	x	x	x	x	x		x	
New Jersey	x		x	x		x	x			x
New Mexico	x	x	x	x				x		x
New York	x	x	x	x	x	x	x		x	
North Carolina	x	x	x	x		x	x		x	
North Dakota		x			x	x	x	x	x	
Ohio		x	x		x	x	x		x	
Oklahoma	x	x	x	x	x	x	x		x	
Oregon		x	x	x		x	x		x	
Pennsylvania	x		x				x			x
Rhode Island	x	x			x	x				x
South Carolina	x	x	x		x	x			x	
South Dakota	x	x	x	x	x	x	x		x	
Tennessee		x			x		x	x	x	
Texas	x	x	x						x	
Utah	x	x	x	x	x	x	x		x	
Vermont	x		x	x		x	x		x	
Virginia	x		x		x	x	x			x
Washington		x	x	x			x		x	
West Virginia	x		x				x			x
Wisconsin			x	x			x			x
Wyoming	x		x				x		x	
1—Vehicle Inspection 3—Motorcycle Safety 4—Driver Education a—Schools b—Pupil Participation 5—Driver Licensing 8—Alcohol a—Implied Consent b—Chemical Testing 11—Emergency Medical Services										

Chart from ROAD AND TRACK (May, 1968, at p. 46).

The death rate per 100,000,000 passenger miles for various means of transportation are:

	Rail	Bus	Scheduled Air	Automobile	General Aviation
1956-60	.17	.10	.55	2.4	
1961-63	.10	.14	.27	2.2	14.0
1964-66	.09	.13	.20	2.4	13.0

The source of the table is Law & Contemporary Problems Summer, 1968 at 527, note 21. Its sources are found in Statistical Abstract of the U. S. 1967, Sec. 21, 551-580.

VII. CONCLUSION, BRIEF RECAPITULATION OF AFFIRMATIVE PROPOSALS
AND A CONSIDERATION OF INTER-RELATIONSHIPS AND COSTS

For more than a half century, scholars have been saying that the fault system could not last, that it would soon "yield to a system of full social insurance with the government playing a role."¹ Perhaps these prophecies would have come true if the tort-fault insurance system had not, by reason of internal changes, especially the spread of liability insurance, managed to provide a large part of the benefits demanded by those whose chief objective was social insurance. But since so much progress toward the objective has been made by these gradual and moderate means, it is time for those who have been making the proposals for drastic change to re-appraise the validity of the old viewpoint. It is, we think, a fact that more progress has been made by progressive changes within the present system than by all the plans of the scholars and the social scientist lawyers.

We have not engaged in an exercise as to how one might design a system for paying reparations to those injured in automobile accidents. Our task is more difficult. We have attempted to proceed in a practical and constructive way, taking into consideration the existence of the present system, a conviction that its essential concepts reflect the deep-rooted instincts and traditions of our society, a belief that proposals for change will not be successful if they depart too drastically from established forms, the fact of criticisms of the present system, the gradual evolution toward more certain protection for the automobile accident victim, the probable legislative impossibility of any substantial decrease in benefits, the desire for a decrease in insurance costs, the existence of many proposals for change, and the fact that several investigations, some elaborate, are pending.

Our method was to examine all of the usual criticisms of the present system. As to some of these, our conclusion was that they were simply invalid. As to virtually all the others, we were able to make responsive and practical recommendations for changes which will either cure, or substantially alleviate, the complaint.

Next we examined many of the existing proposals for change, giving special attention to those which, in view of the stature of the proposers or the nature of the proposal itself, seemed most likely to receive serious consideration. All of them seem to us to contain serious flaws of one kind or another. A certain pattern emerges.²

¹ Smith, Sequel to Workmen's Compensation Acts, 27 HARV.L.REV. 235 (1914), and James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 YALE L.J. 549 (1948).

² Appendix A is a chart analysis prepared by Ronald Rock of the American Bar Foundation of several of the proposals.

Those that stress cost reduction propose to cut costs by reducing benefits through: (1) subtracting the benefits received from other sources, or (2) using a deductible, or (3) limiting or eliminating damages for pain and suffering.

Those that stress certainty of payment either eliminate or limit the use of the fault principle and/or use a formula to determine some or all of the benefits. Those that don't abandon the fault test try to combine payment of benefits without regard to fault with allowing the tort action to continue.

None of the plans have paid enough attention to the desirability and virtual necessity of making changes in a gradual and evolutionary way or to the severe disruptions to the legal profession, insurance industry and public that would occur if they were to be adopted. None of the plans that hold out a prospect of cost savings adequately preserve the values of the present system. None are as adaptable, as flexible or as responsive to changing needs. In the effort to save existing values, some plans superimpose substantial benefits without regard to fault. When this route is followed, the added expense in itself seems to assure the nonadoption of any such plan on a compulsory basis.

Those plans that either abolish fault entirely as a basis for recovery, or do so as to a large proportion of the cases, are not only going against our instinct and tradition, but they abandon partly or entirely the value of deterrence. We quote once again from Keeton-O'Connell, this time with nearly full approval:

"Proposals to eliminate completely the common law action for negligence are perhaps doomed to founder as unable to muster the necessary widespread political support. Moreover, even apart from such pragmatic considerations, and on grounds of principle, to make a case for some protection regardless of fault is not necessarily to make a case for the total irrelevance of fault. Especially in the egregious case in which injuries and damages reached catastrophic proportions and fault is clear, there is much to be said for awarding tort damages against the person at fault and for including in those damages compensation for the pain and suffering accompanying a prolonged and bitter convalescence or permanent disability. Views in favor of basing liability on negligence cannot be ignored, even though it may be difficult to identify and articulate their supporting grounds. Too many people, for too many reasons, believe that negligence has at least some place in the automobile claims system. Moreover, perhaps they are right."³

³ KEETON & O'CONNELL at p. 164-165.

Professor Conard, although the author of a plan that would bring vast changes in the present system, would preserve, adapt, amend and improve rather than abolish the tort system. He says "Nothing that has been disclosed by recent factual research or the experience of foreign countries has indicated that the tort system of reparations for automobile injuries should be abolished." Among the tasks he mentions as being those the tort system alone can perform are: "The vindication of the innocent, and the punishment or admonition of the guilty"; "the reparation of property loss and psychic loss"; "in appropriate cases, the restoration of earnings above the minimal."⁴

Some of the plans, in the effort to offset the added costs caused by abandonment of the fault basis, find it necessary substantially to reduce the benefits payable. They are subject to severe drawbacks: inadequate compensation to all -- even the most deserving; the same scale of compensation to the least deserving; an abandonment of efforts to make the damages commensurate with the injury in every case; inflexibility instead of flexibility.

The pressures of the facts have produced some odd combinations. A no fault plan for a large percentage of the cases combined with a fault plan for the rest -- but with a floor. An "insure yourself" basis for some cases. A "collect from the other party" basis for the others. Looking back at these proposals from some point in the future may produce much the same reaction as we now have to the Columbia plan. Even so, the work will not have been in vain.

Never has there been as much protection for those injured in auto accidents. Never have insurance buyers had greater protection against unfair prices or practices. Never have we had safer cars, better roads, a better educated Bar, or a more professional judiciary. Never has there been so much information available, so many ideas to consider, and so earnest a search for continued improvement.

Our conviction is that the best prospect for such improvement lies in the retention of the present system with the changes, additions and modifications that we propose.

⁴ Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH.L. REV. 279 (1964), reprinted in DOLLARS, DELAY AND THE AUTOMOBILE VICTIM at p.445 (1968).

Inter-relationships and Costs

Let us consider the results of our proposals and recommendations for affirmative action, how they interrelate and their probable effect upon the cost of insurance.

I. Proposals that aid injured persons to obtain a judgment for damages for their injuries.

These are:

A. Abolition, as to automobile cases, of the doctrine of the immunity of charitable organizations;

B. Abolition, as to automobile cases, of the doctrine of governmental immunity;

C. Abolition, as to automobile cases, of intra family immunities.

Of these three only the last named will have any upward effect on insurance rates paid by an individual buyer. We believe that it will be very small.

D. Abolition of the doctrine of contributory negligence and adoption of a doctrine of comparative negligence, as in Wisconsin, accompanied by provision for contribution among joint tortfeasors and a consideration of abolishing the last clear chance rule.

The practical effect of doing this depends on the extent to which particular states have been applying the comparative negligence doctrine in the absence of a statute. In such states the effect should not be great. In states where adjusters and juries have been applying the contributory negligence rule, the effect will be to permit more claimants to recover. This does not necessarily mean a marked increase of insurance costs, because theoretically the verdicts in some cases will be moderated. No precise cost predictions can be made. We hope that arrangements will be made for "before and after" comparisons by those states that move promptly to adopt this recommendation.

II. Proposals that assure the collectibility of judgments.

A. Universal financial responsibility secured by requiring liability insurance or other evidence of financial ability to pay judgments.

Some cost increase is possible, the extent of which depends on the nature and size of the group of people newly required to insure. If they cause more than a proportionate increase in accidents the total cost of insurance will go up, but careful rate making should be successful in placing most of the burden of the cost increase upon those who cause the accidents. There should be an offsetting factor because the cost of uninsured motorist coverage will be sharply reduced when compulsory in-

surance becomes effective. This will occur in states not now having compulsory insurance. An additional offset could come from bringing uninsured motorist cases under the bodily injury coverage. At present in most states, uninsured motorist coverage cases cost more, on the average, than bodily injury cases -- perhaps because of arbitrating these cases and to the difficulties of handling liability cases on a first-party basis.

There will be an important side effect of universal coverage. The prospect now of obtaining a proper settlement if the defendant is uninsured and the claimant is not entitled to collect under uninsured motorist coverage is remote. After financial responsibility becomes universal, more claims will be settled.

B. Universal uninsured motorists coverage.

This coverage will provide protection in case the insurer of the defendant becomes insolvent, protection for the insured against hit-and-run drivers and protection for the insured against being involved in an accident with a stolen car. It does this by treating cars insured by insolvent companies, hit-and-run cars and stolen cars as uninsured cars. It also will cover the insured against being struck by a car illegally operating without the required liability insurance.

This coverage will cost substantially less than it does now since most of its present function is taken over by required liability insurance. (In Massachusetts, where compulsory insurance is in effect, its cost has been \$2.)

III Proposals that improve the prospect for the prompt settlement of cases.

In addition to those proposals discussed in I and II above, all of which will enhance the prospect of prompt settlement of claims, we have made recommendations aimed specifically at this objective:

- A. The "offer of judgment" procedure.
- B. The proposal to make limits of liability insurance discoverable but not admissible in evidence.
- C. The proposal for automatic settlement conferences.
- D. The proposal respecting the quick settlement option.

Additionally all of the recommendations aimed at reducing delay in court will have beneficial effects in speeding up settlements, as will the further development of advance payment plans.

We believe that all of these proposals in combination should have an incidental effect of holding down insurance costs.

IV Proposals that relate to the reduction of delay in court:

More judges where needed,
Training for advocacy,
Judicial education,

Judicial Administration,
 A unified court system,
 The appointment of court administrators,
 Judges selected on the basis of merit, assured of secure
 tenure and salary, adequate retirement pay and subject
 to discipline,
 Lawyers to be ready for trial and to do their work with
 greater dispatch,
 Better scheduling of cases for trial,
 Encouragement of voluntary waivers of jury trial,
 Streamlined selection of jury panels,
 Trials by juries of less than 12,
 Non unanimous verdicts,
 Automatic pre trial settlement conference,
 Impartial medical panels,
 Remanding cases where appropriate,
 Various efforts to expedite settlements,
 Continued search for more satisfactory plans for the
 voluntary arbitration of regular negligence cases
 and continuation of existing plans for arbitration.

All of these proposals are believed capable of contributing to the reduction of delay in court. If delay is reduced, both settlements and other dispositions should be expedited. The effect on costs, though secondary in importance to the desire for speedy and efficient justice, should be favorable.

V Proposals to eliminate the problem of the uncompensated injured person

All proposals that make recovery of damages more certain will result in reducing the number of uncompensated injured persons. But as long as we continue to have an automobile reparations system in which there can be no recovery from the defendant unless he can be proved to be at fault, there will continue to be persons who are not compensated. Doubtless this, as a social problem, is becoming smaller in view of the growth of benefits from other systems. Nevertheless, it seems likely that the uncompensated victim will continue to be used as a basis for criticism of the present system.

Perhaps we have found a feasible cure by a modified form of medical payments coverage described in the text of our report. Our proposal that this be studied further is based on humanitarian feelings and a consideration of the possibility that paying these modest benefits without regard to fault, but within the form and framework of the fault system and on a basis that credits them on any settlement or judgment, will not weaken but strengthen and make more certain the preservation of the values of our present system.

VI Proposals relating to highway safety and the deterrence of negligent conduct

We believe that effective deterrence of negligent conduct can be

achieved by a combination of civil and criminal sanctions, including a continuation of the fault principle, by education and law enforcement and by the wise use of insurance rating practices that impose financial detriments on dangerous drivers or grant awards to those who conduct themselves so as to avoid accidents. We urge lawyers to aid and support the cause of highway safety.

It is evolutionary improvement that we seek. All of our recommendations are aimed at this objective.

It is probably unnecessary to state that not every member of the committee agreed with every conclusion stated or with the manner of statement. Nevertheless, at least a majority of the entire committee has agreed with every recommendation or proposal that the committee is making.

Respectfully submitted,

Nelson C. Barry
 Horace W. Gilmore
 Raymond H. Kierr
 Edward W. Kuhn
 John M. Moelmann
 John T. Reardon
 J. Ronald Regnier

George B. Powers, Chairman

Franklin J. Marryott, Reporter
 1969

APPENDIX A

NAME	COLUMBIA PLAN	GAZDACHMAN	ELIMINATED	LEON GREEN	ONTARIO	BOYD- O'DONNELL	PALTMOUTH STATE SEC	MORTUARY	QUARTERED BENEFITS	14A	14A	14B
YEAR	1932	1946	1954	1958	1963	1965	1965	1967	1968	1968	1968	1968
HON-FAMILY	YES	YES	YES	YES	YES	YES	YES	YES	YES	NO	YES	YES
TOT RESEDY ATTAINED	NO	YES	YES	NO	YES	YES	YES	NO	YES	YES	YES	YES
CONSECUTIVE BENEFITS	YES-PRIVATE	YES-GOV.	NO	YES-PRIVATE	NO	YES-PRIVATE	YES-PRIVATE	YES-GOV.	OFFERED BENEFITS	YES	YES	YES
U.T. KIT	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
PROTECTION	NO	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
DEDUCTIBLE	1st 7 days	1st 7 days	1st 7 days	\$100	1st 7 days	\$100 or 10% work loss	NO PROPOSAL	NO PROPOSAL	NO PROPOSAL	YES	NO	NO
SCHEDULED BENEFITS	YES	YES	YES	NO	YES	NO	YES	YES	NO	NO	NO	NO
PERIODIC PAYMENTS	YES	YES	YES	NO	YES	YES	YES	YES	YES	NO	YES	NO
PAY AND SCHEDULE	NO	NO	NO	NO	NO	NO	NO	NO	YES	YES	NO	NO
PROPERTY DAMAGE	NO	YES	NO	YES	YES	NO	YES	YES	NO	NO	YES	NO
SUBROGATION	YES	YES	YES	YES	YES	NO	YES	NO PROPOSAL	NO	YES	NO	NO
DEDUCTION COLLATERAL SOURCES	NO PROPOSAL	YES	YES	YES	YES	YES	NO PROPOSAL	NO PROPOSAL	NO	YES	NO	YES
JURY TRIAL	NO	YES 2	YES	NO	YES 4	YES	YES 77	NO	YES 77	NO	YES	YES

FOOTNOTES

- a. Medical benefits, however, would be paid from the date of disability. Columbia at 140.
- b. Subrogation would only be allowed against someone whose negligence had caused the accident, but who was not injured nor an occupant or owner of a motor vehicle. Id. at 139-140.
- c. Supplemental coverage beyond the statutory limits is available from private insurers as well as the Saskatchewan Government Insurance Office, which administers the act. Shumiatcher, Morris C., State Compulsory Insurance Act -- An Appraisal. 39 Can.B.Rev. 107, 120-121 (1961).
- d. There is a \$200 deductible for private passenger cars insured under first party coverage. Id. at 114.
- e. Subrogation is generally allowed against motorists and others who are uninsured or not eligible for protection but cause damage and injury. Sask.Rev.Stat.c. 409, §§ 51(4), 48(5), 78 (1965).
- f. "A considerable reduction of premiums...could be achieved by providing for a waiting period of seven days, which is said to eliminate 32 per cent of accident claims; and by taking into account payments received by the victim from other sources (such as independent accident insurance) for cash expenses (such as surgery) though not for loss of income or unmeasurable harm". Ehrenzweig at 38.
- g. Green at 89. Professor Green hoped this deductible might later be lowered. Id. at 96.
- h. Green suggests that the right of subrogation be permitted against hit-and-run drivers and out-of-state motorists. Id. at 91-92. He does not mention other uninsured motorists.
- i. "In case of injury to an employee covered by workmen's compensation, but not both." Id. at 99. No other mention of collateral sources.
- j. A deductible of \$100 has been suggested to reduce the high administrative cost of small claims and free additional funds for greater losses. Linden, Allen M., Peaceful Coexistence and Automobile Accident Compensation, 9 Can. B.J.5, 16 (1966).
- k. Denial of subrogation is not made explicit in the Ontario proposal but can be inferred from other language in the Report. Keeton, Robert E., O'Connell, Jeffrey, Basic Protection for the Traffic Victim, 156n. 10 (1965).
- l. This deductible can be eliminated or increased to as high as \$300 or 30% through supplemental provisions offered by private insurers. Id. at 309-311.
- m. The Special Committee on Personal Injury Claims was not specific on all matters but it was possible to infer some details on the basis of their

suggestion that California adopt a compulsory form of insurance similar to the Saskatchewan Plan. Id. at 148-152.

- n. Moynihan did not present a detailed plan either, but he did suggest a workmen's compensation manner of payment. Moynihan, Daniel P., "Are We Ready for a Drastic Change?" Trial, Oct.-Nov. 1967, at 27, 30.
- o. Medical expenses up to \$5,000 will be paid to all victims regardless of fault. Further benefits up to \$7,500 will be offered as an alternative to tort recovery in cases of clear (insurer) liability and questionable liability. If the program is successful the option will be offered to all except the most blatant violators regardless of fault. Chicago Sun-Times, June 14, 1968, at 28.
- p. "Benefits will continue to be paid on a third party basis... However, in the case of a one-car accident or in the case of a hit-and-run or uninsured driver, the policyholder's own insurer would pay." Maison-pierre, Andre, Statement of the American Mutual Insurance Alliance Before the New York Legislative Committee on Insurance Rates and Regulations, at 5 (February 21, 1968).
- q. "...there will be no deduction for benefits received from collateral sources such as group accident and health plans." Id. at 6. However, workmen's compensation payments are deducted and "...if the same participating carrier has a contractual obligation under Medical Payments Coverage of any policy to a claimant who is also eligible for Guaranteed Benefits, payments of the contractual obligations shall be paid first and only the excess shall be paid under Guaranteed Benefits. Payments for medical losses, however, will not be duplicated by the same carrier." American Mutual Insurance Alliance, Illinois Experiment in Guaranteed Benefits -- Objectives of Experiment, at 4 (1968).
- r. At least it appears that hit-and-run victims will be compensated. The case of uninsured motorists is somewhat ambiguous.
- s. Deductibles are permitted in first party coverage to the named insured and members of his family at the option of the insured with a maximum limit on the amount of such deductions.
- t. Cf., however, the "Mend" Plan.
- u. If the victim pursues recovery for pain and suffering on his own.
- v. Premiums may be reduced for the exclusion of collateral source recoveries.
- w. Claims against the insured are pursued by arbitration. But recovery for pain and suffering would come only via the usual tort procedures, presumably involving juries.
- x. For a non-resident tortfeasor from a state which has no plan.
- y. "[B]enefits due to the insured from collateral sources...should not be subtracted in determining the amount of economic loss sustained as the

result of an automobile accident. At the same time, duplication of benefits is undesirable and should be precluded wherever possible." (p.5)

- z. Only for those seeking an ordinary tort remedy above and beyond the initial compensation awarded under the plan.
- zz. For amounts above exclusions an ordinary tort remedy is available.
- yy. If choice is to proceed in tort a jury is available.

EXPLANATION OF RHODE ISLAND SENATE BILL S512, JANUARY SESSION, 1968, AS STATED IN AN ATTACHMENT TO THE BILL.

This act will provide a compulsory automobile insurance system for Rhode Island centered around a modified form of the plan for basic protection insurance devised by Professors Keeton and O'Connell.

In order to register a motor vehicle in Rhode Island, the owner will have to have basic protection insurance, one of two forms of property damage dual option coverage, and liability insurance at least equivalent to \$15,000 per person and \$30,000 per accident.

Basic protection insurance will pay for up to \$10,000 of net economic loss arising out of the operation of a motor vehicle for each claimant, regardless of fault.

Net economic loss will be arrived at by first deducting all collateral sources such as sick benefits and Blue Cross and Physicians Service, but insurers will be required to offer an optional coverage under which collateral sources will not be deducted.

Under the minimum required coverage to the extent that sick benefits are used as the result of an automobile accident and then are needed within one year in connection with another sickness, the insurer will pay their equivalent.

Basic protection insureds will have a tort exemption for the first \$5,000 of pain and suffering and the first \$10,000 of all other damages awarded. Basic protection insurance would therefore partly replace the present tort system by taking care of the smaller cases and a part of the bigger cases on a non-fault basis, but leaving the higher elements of damages in the bigger cases relatively unchanged.

Insurers will be required to offer deductibles of \$100, \$200, and \$300 and 10%, 20% and 30% of work loss. These deductibles would apply to the insured and members of his family residing in the same household on a per accident basis rather than on a per person basis. They would not apply to the claim of a pedestrian or non-family occupant of the car.

This act would require insurers to offer a pain and inconvenience coverage under which the insurer would pay a specified amount per week of total or partial disability. Insurers would be permitted to offer a pain and suffering option with the approval of the insurance commissioner.

This act would set up an assigned claims plan to pay basic protection benefits to those injured in automobile accidents within the

state who could not identify a basic protection insurer against which to recover. This would include pedestrians in hit-and-run accidents, nonresidents, insureds of insolvent companies, and insureds under a policy whose over-all limit of \$100,00 per accident had been exhausted.

One of two forms of property damage dual option insurance would be required in order to register an automobile. Each would provide liability protection of at least \$5,000 for damage or destruction of property of others, other than a motor vehicle covered by property damage dual option insurance, in any one accident. Under each the insured would be dealing with, and would recover from, his own insurance company. The first option, the "Non-fault option" would be similar to today's collision insurance in that after any deductions it would pay the insured for damage to his own vehicle as the result of collision or upset, regardless of fault. The principal difference would be that the insurer would not recover on a subrogation theory from the driver of the other car if the other car was covered by property damage dual option insurance.

The second or "Liability option" would pay the insured only if he could show he was entitled to recover on a liability theory from the other driver. Once again his insurer would not recover by subrogation from the other driver unless the other car was not covered by property damage dual option insurance.

The act also considerably broadens Rhode Island's assigned risk plan and takes its statutory provisions out of the motor vehicle code and puts them in title 27 "Insurance".

All forms of basic protection insurance required to be offered by insurers would be available under the assigned risk plan including all forms of added protection insurance required to be offered, property damage dual option insurance, and liability insurance to a limit of at least \$20,000 per person and \$40,000 per accident. The commissioner could provide for the availability of additional types and limits of insurance through the assigned risk plan.

The provisions of the act concerning rate-making, the assigned claims plan, and the assigned risk plan are designed to permit rates to vary according to the risk to the insurer represented by different classes of insureds. Thus classifications would be arranged and rates would vary according to traffic violation records, extent of collateral sources, and other factors.

This act would go into effect on April 1, 1969.

MINORITY RECOMMENDATIONS AND REPORT
OF ORVILLE RICHARDSON

I.	Minority Recommendations	Page 1
A.	Regarding delay in the courts	Page 2
B.	As to substantive liability law	Page 6
C.	As to damages	Page 7
D.	As to certain categories of injured persons	Page 8
E.	As to costs	Page 9
F.	As to automobile insurance	Page 10
G.	As to deterrence in tort law	Page 11
H.	As to highway safety	Page 11
I.	As to the Cotter Plan	Page 11
II.	Minority Report.	
A.	"Pure" comparative negligence versus the Wisconsin "50 percent bar" rule	Page 12
B.	Special verdicts	Page 17
C.	Contribution and comparative negligence	Page 21
D.	Automobile guest statutes	Page 22
E.	Torts and taxes	Page 28
F.	Compulsory arbitration with a right of appeal and trial de novo to a jury	Page 30
G.	Contingent fees and defense counsel fees	Page 33
H.	The cross-over plan (COP) for compulsory medical pay reimbursement coverage	Page 39
I.	The Quick Settlement Option Plan (SOP)	Page 43
	Conclusion	Page 51

MINORITY RECOMMENDATIONS AND REPORT
OF ORVILLE RICHARDSON

The Majority Report should be received and filed as a useful study of at least some of the problems involved in automobile accident reparations.

I respectfully but strongly disagree with some of the Majority's Recommendations and feel that they should be tabled to await the results of intensive studies of the Department of Transportation and several Congressional committees whose work will be largely completed by the end of this year. The House of Delegates is entitled to have the benefit of those investigations which will produce a mass of information which has never been assembled before.

In January, 1969 the Special Committee on automobile accident reparations filed a lengthy Report and made a large number of recommendations. I filed a Separate Report with recommendations, all of which I withdrew in order to support two important Majority Recommendations which the House adopted. Those recommendations

- (1) favored retention of "the present system for providing reparations for those injured in automobile accidents, based upon the concept that if there is no fault there is no liability and relying upon an adversary method of trial before a court or jury as the means of determining liability and the amount of damages", and
- (2) opposed "proposals which would severely reduce benefits payable to persons injured in automobile accidents or would abolish or substantially abolish the tort basis for the automobile accident reparations systems".

Despite the adoption of those Resolutions by the House of Delegates, the Majority of the Special Committee is now favoring or recommending some changes which will seriously undermine the proposition of "no liability without fault", cripple the adversary system and the independence of the bar, and severely reduce benefits payable to persons injured in automobile accidents. In addition, some of the Majority's proposals are incomplete, inconsistent, inequitable or inefficient.

This is not to say that I do not agree with some of the Majority's recommendations. The Majority has proposed many excellent and far-reaching reforms, although I have some minor disagreements with the methods suggested for their implementation. I agree with abolition of the immunities and the adoption of a comparative negligence doctrine though not of the Wisconsin type. I agree with some of the 24 proposals under "A.

Recommendations Regarding Delay in the Courts". I agree with "G. Recommendations as to the use of the Tort Law to Deter Dangerous Driving," and "H. Recommendations as to Highway Safety". Perhaps I can best illustrate my agreements and disagreements by setting out a complete set of Recommendations of my own, using footnotes to illustrate the similarities and differences between the Majority's views and my own.

Minority Recommendations.

A. RECOMMENDATIONS REGARDING DELAY IN THE COURTS

WE RECOMMEND:

1. Further efforts to assure that judges be selected on the basis of merit, including the adoption by state and local bar associations of by-law provisions defining the procedures for the participation of the association in the process of judicial selection.

(Same as the Majority's A, 1.)

2. The adoption of a plan or rule under which judges, as long as they perform their duties in a satisfactory manner, are assured of adequate pay, secure tenure in office until a stated retirement age, and then retirement under an adequate retirement plan.

(Same as the Majority's A, 2.)

3. The adoption of a plan or rule under which judges can be assisted, retired, removed or disciplined, with safeguards for the judge and those who complain about him.

(Essentially the same as the Majority's A, 3 except that I object to the adjectives "lazy, incompetent, aged, ill or otherwise infirm". Moreover, assistance of such judges will often accomplish more than threats to remove or discipline them.)

4. The adoption and implementation of a plan, by constitutional amendment if necessary, for a unified court system with power in one of the judges to assign other judges to judicial service so as to relieve court congestion and generally to utilize the available judges to best advantage.

(Same as the Majority's A, 4).

5. That adequate judicial statistics be maintained.

(Same as the Majority's A, 5.)

6. That in jurisdictions having many courts, or in which a need has arisen from other causes, court administrators be appointed, responsible to the chief judge or to the administrative

judge, for the performance of the administrative work of the courts.

(Same as the Majority's A, 6.)

7. That court administrators attempt to devise, or assist the court to devise, to the maximum feasible degree, ways of scheduling cases for trial so as to maintain an uninterrupted flow of cases.

(Same as the Majority's A, 7.)

8. That voluntary waivers of jury trials be encouraged and that plans such as the Los Angeles Plan, under which panels of judges who attract jury waived cases are utilized, be experimented with in other jurisdictions.

(Same as the Majority's A, 8.)

9. That measures be taken to streamline the selection of jury panels and to shorten the voir dire without loss of its value.

(Same as the Majority's A, 9.)

10. That a pretrial conference be scheduled if the court or either party so requests.

(There is no necessity whatsoever in vast areas of the United States to schedule pretrial settlement conferences in every case. Moreover, in jurisdictions where there is only one judge he should not participate in settlement conferences since he will be asked to rule on the weight of the evidence and excessiveness or inadequacy of the verdict if the case is tried.)

11. That in jurisdictions which now permit the use of juries of less than 12, such smaller size (not less than 6 persons) juries should be used. Where such juries are not now permitted, provision should be made for their use.

(Same as the Majority's A, 11.)

12. That non-unanimous verdict should be permitted.

(The Majority's A, 12 favors non-unanimous verdicts but only where a 12 man jury is used, in which case it would permit a verdict to be rendered by 9 jurors. This means that if a 10 man jury is employed all 10 must agree. Such a rule is arbitrary and illogical.)

13. That methods be devised to make impartial experts and their testimony available to litigants.

(The Majority's A, 13 opts for impartial medical panels. I disagree. Moreover, if they are needed in some areas, which I doubt, they are not needed in others. Finally, there are some jurisdictions where it would be almost impossible to find enough doctors to make up such a panel. A better solution

is to assist lawyers in finding impartial experts of all kinds and in all cases, particularly medical malpractice cases.)

14. In appropriate cases provision should be made permitting the use of video tape in presenting the testimony of witnesses.

(The Majority's A, 14 would limit the use of video tape to medical witnesses. The limitation is unnecessary.)

15. Special attention should be given to improving minor courts and those with limited jurisdiction to encourage greater resort to those courts by persons having small claims.

(The Majority's A, 15 would give judges power to transfer cases to lower courts if the judges believe that "the case should have been commenced" there. I disagree with giving judges that enormous power. No guidelines are suggested. The additional work and expense would be enormous. My suggestion, improvement of minor courts, is one long favored by the American Judicature Society and the American Bar Association. The small claims which everyone seems anxious to get rid of, even to the point of arbitrarily limiting recoveries for pain and suffering, would be brought in the lower courts if they were improved and if the procedures there were simplified.)

16. Continued efforts to dispose of claims by prompt settlement.

a. In aid of such efforts, and for other reasons, a change to the comparative negligence doctrine (which may have the effect of making total victory for either side less likely) is recommended.

(Same as the second sentence of the Majority's A, 16.)

b. Making the limits of liability insurance discoverable is recommended.

(Same as part of the Majority's A, 16.)

c. Procedures should be adopted which would penalize any refusal to accept a fair offer after suit is begun, whether the offer is made by the plaintiff or the defendant.

(I object to the Majority's plan to coerce plaintiffs into accepting fair offers without also providing some penalty on the defendant for failing to make a fair offer.)

d. The practice of insurers and defendants of making periodic advances to claimants, pending settlement or trial, should be conditioned upon (1) no overt statement or attempt to advise claimants of their legal rights or to prevent them from seeking legal advice, (2) no attempt to use such periodic payments as a method of obtaining an improvident release from the claimant, (3) the giving to the claimant of a written notice of the statute of limitations involved, and (4) where needed, the enactment of legislation to permit prompt disposition of some claims (such as property damages) arising out of an accident without prejudice to the defense of other claims and to permit advance payments without fear that they will be construed as an admission of liability.

(The Majority's A, 16 favors the present advance payments practices of many insurers but provides no protection for claimants. My recommendations are badly needed to protect claimants as well as insurers.)

17. That the right of trial by jury should not be abolished as respects negligence cases arising from automobile accidents, nor should its use be interfered with by procedural obstacles or by the imposition of unreasonably high costs upon the litigants. (Same as the Majority's A, 17.)

18. In areas of great delay and court congestion courts and local bar associations should experiment with the Philadelphia Arbitration Plan providing for compulsory arbitration of categories of small tort and non-tort claims with a right of appeal and trial de novo to a jury.

(The Majority's A, 18 favors voluntary arbitration of uninsured motorist coverage claims and ignores the fact that in many states insurers by the terms of the policy can compel arbitration. My views concerning arbitration are set out in the Minority Report.)

19. The continuation of efforts to bring about a fair and workable plan for the voluntary arbitration of appropriate categories of small tort claims arising from automobile accidents, but the emphasis should be on efforts to improve the stature of the courts and their ability to do their work on time, on assuring litigants easy access to the courts for the resolution of their controversies by professional judges, and on seeing to it that the right of trial by jury is preserved, in fact and in theory.

(Same as the Majority's A, 19.)

20. That programs of judicial education be intensified and expanded and that judges, particularly new judges, should be enabled to participate in the programs at public expense.

(Same as the Majority's A, 20.)

21. That greater emphasis be placed on training lawyers for advocacy, both in the law schools and in continuing legal education.

(Same as the Majority's A, 21.)

22. That judges should adhere to work schedules developed by the administrative judge to the end that judicial work loads are consistent with generally acceptable standards, and that in jurisdictions where the pace of judicial performance is recognizably slow the local bar associations should, if necessary, initiate speed up programs.

(Same as the Majority's A, 22.)

23. That lawyers should not contribute to the problem of delay by being dilatory in their work, or by failing to be ready to proceed with the case when it is reached for trial.

(Same as the Majority's A, 23.)

24. That in places where excessive and unjustifiable delay in the courts now exists, the number of trial judges should be increased, and whenever the need is clear, appropriate increases in supporting personnel and physical facilities should be provided. The recommended method of assuring that the number of judges be current with the expanding need is a constitutional or statutory provision which creates a new judicial office and requires it to be filled upon each significant change in the ratio between the population and the number of judges.

(Same as the Majority's A. 24.)

B. RECOMMENDATIONS AS TO SUBSTANTIVE LIABILITY LAW

WE RECOMMEND:

1. That the states adopt the "pure" comparative negligence system without special verdicts. If both parties recover a verdict, diminished in proportion to their fault, their recoveries should not be offset against one another but should be paid by the respective insurers.

(My views concerning comparative negligence are set out in the Minority Report. I oppose the Wisconsin type of comparative negligence and I oppose the use of special verdicts.)

2. That statutory provision be made for contribution among joint tortfeasors.

(See the Minority Report for my views as to contribution among joint tortfeasors.)

3. That the last clear chance doctrine be abolished in states adopting the comparative negligence rule.

(There is no point in preserving the last clear chance doctrine if comparative negligence is adopted. The Majority's A, 3 refuses to take a stand on the matter.)

4. That the doctrine of governmental immunity, as respects states and municipalities, through departments, commissions, boards, institutions, arms or agencies, be abrogated so as to make such defendants liable for injuries and damages negligently inflicted through their operation, maintenance or use of automobiles.

(Same as the Majority's B, 4.)

5. That the doctrine of the immunity of charitable organizations be abrogated.

(Same as the Majority's B, 5.)

6. That the doctrine of the immunity of a spouse to the tort claim of the other spouse be abolished.

(Same as the Majority's B, 6.)

7. That the doctrine of the immunity of a parent to the tort claim of his child and of the immunity of a child to the tort claim of his parent be abolished.

(Same as the Majority's B, 7.)

8. That automobile guest statutes be repealed.

(The Majority Report contains a brief discussion of automobile guest statutes but the Majority makes no recommendation as to their retention or repeal. My own views are set out in the Minority Report.)

C. RECOMMENDATIONS AS TO DAMAGES

WE RECOMMEND:

1. The use of additurs and remittiturs.

(Same as part of the Majority's C, 1.)

2. Removal of the statutory limitation upon damages in death cases.

(Only one state with a death limit, Massachusetts, allows recovery for non-pecuniary damages in wrongful death cases. The Majority Report's recommendation C, 1 would permit one state in the Union, Massachusetts, to retain its death limit.

The Majority Report tends to coerce Massachusetts to switch to a pecuniary loss rule. By inference it would seem to favor such a rule in other states now without a death limit.)

3. Alteration of the collateral source rule so as to bar recovery (by excluding evidence thereon) of benefits paid or expected from sources to which the claimant made no direct, major contribution, except in cases where the person, organization or fund was entitled to a lien on account of the payments made or benefits received.

(The Majority's C, 1 would not alter the collateral source rule. Unfortunately I do not have enough time to demonstrate at sufficient length the equity of my recommendation.)

4. No subrogation should be permitted in any form. However in certain instances (collision insurance, workmens compensation and government funds out of which medical expenses or wage losses are reimbursed or out of which medical or rehabilitation services are provided) a lien should be created upon the cause of action of the claimant to the extent of payments made or due. The claimant would have a fixed period in which to assert his claim and if he did so within that period he would be entitled to the reasonable expenses and costs, including attorneys fees, of protecting the lien. If he failed to assert the claim within that period, the lienor could then proceed, returning any excess over its lien, after deduction of its reasonable expenses and costs, including attorneys fees, of recovery on its behalf and on behalf of the claimant.

(The Majority makes no recommendation as to subrogation. My proposal would meet requirements of good economic theory and protect lienors as well as lawyers who assist them in recovering payments made.)

D. RECOMMENDATIONS AS TO CERTAIN CATEGORIES OF PERSONS INJURED IN AUTOMOBILE ACCIDENTS.

WE RECOMMEND:

1. As to the wholly uncompensated person--

Consideration of the establishment of a fund, state or federal, under which all persons injured or diseased by accident or illness, be provided with payments necessary to obtain prompt medical care and reimbursement for wage losses without regard to need. Such a fund would have a lien under the conditions described in C, 4 above.

(The Majority's D, 1 favors study of a plan under which every person involved in an automobile accident would be paid his medical expenses up to a certain amount, even if he was the only one at fault. It proposes that these payments be made on

a third party or cross-over basis in collisions of two or more cars. A's insurer would pay B and B's insurer would pay A. This is a serious departure from the House's Resolution in January, 1969 which favored "no liability without fault". I disagree with the Majority and have explained my position in the Minority Report under the heading of "COP". If we decide to favor give-aways on a no-fault basis we should not discriminate against persons injured or ill by causes other than automobile accidents. Moreover government can make these payments at far less costs than insurance companies incur.)

2. As to the so-called overcompensated claimant--

More stringent application by insurers of the moral rule that no one should be paid damages on a "nuisance" basis or solely to prevent injured persons from seeking legal advice and assistance. Since such payments are said to be made with respect to small claims, other recommendations herein relating to arbitration will make it easier and less expensive to litigate all claims, particularly the small ones.

(The Majority's D, 2 favors study of a plan under which insurers would have a unilateral option to settle certain claims on the basis of a formula of a certain multiple of part of the medical expenses. I disagree and have made known my views in the Minority Report under the heading of "SOP". My own recommendations, coupled with present practices of insurance companies, would seem adequate to handle the problem, if one really exists.)

3. As to the seriously injured, under-compensated claimant -

a. No automobile liability insurance policy should be written with limits of less than \$50,000.

(The Majority recommends minimum limits of \$10,000/\$20,000.)

b. The government fund referred to in 1 above can be used as excess insurance to take care of the long term medical needs and income losses of seriously injured, under-compensated individuals.

(The Majority makes no such recommendation.)

E. RECOMMENDATIONS AS TO COSTS.

WE RECOMMEND:

1. Automobile Insurance Costs. --Further and persistent

effort should be made to find better and less costly ways of providing and distributing the automobile insurance product and of performing all other automobile insurance services with optimum speed and economy.

(Same as the Majority's E, 1.)

2. Costs of legal services. Fees of plaintiffs' and defense counsel should continue to be subject to such supervision and regulation by state legislatures, courts and bar associations with guidance by the American Bar Association through its standing and special committees.

(I strongly disagree with the Majority's E, 2 for reasons set out in the Minority Report. My chief disagreement is the intrusion by this special committee into the province of at least three other committees of the American Bar Association.)

F. RECOMMENDATIONS AS TO AUTOMOBILE INSURANCE.

WE RECOMMEND:

1. Compulsory insurance or its equivalent at the time of registration of a motor vehicle should not be required. Instead, all financial responsibility laws ought to be strengthened and rigidly enforced, and should be coupled with some kind of fund arrangement to provide payments for persons injured by hit-and-run drivers, uninsured persons, etc. where no insurance such as uninsured motorist protection is available.

(The Majority's F, 1 favors compulsory insurance.

Even under compulsory insurance gap-closing funds are needed as in New York.)

2. See Recommendation D, 3, a.

3. Each automobile liability insurance policy must offer, subject to rejection only in writing, uninsured motorist coverage which includes insolvency protection.

(The Majority's F, 2 would compel everyone to carry uninsured motorist coverage.

4. Support should be given to the enactment of S.2236 creating a Federal Insurance Guaranty Corporation, introduced into Congress by Senators Magnuson, Hart, Dodd, Pastore, Moss, Hollings and Inouye.

5. Conditions precedent and subsequent in liability insurance policies should be no bar to a recovery by a claimant on the policy. Violations of such conditions would be subject to indemnity actions by the company. The only permissible exclusions should be: (a) damages insured under a nuclear energy liability contract, (b) damages to an employee compensable under workmens compensation laws, and (c) property owned or transported by the insured or rented to or in charge of the insured other than a residence or private garage. All liability insurance policies ought to be clearly worded in comprehensible language.

(The Majority makes no such recommendation.)

G. RECOMMENDATIONS AS TO THE USE OF THE TORT LAW TO DETER DANGEROUS DRIVING.

WE RECOMMEND:

1. That efforts to utilize the tort law and the insurance rating system, as well as the criminal law to deter dangerous driving be continued, and that studies seeking further enlightenment as to how these effects can be most effectively and acceptably produced should be encouraged.

(Same as the Majority's G, 1.)

H. RECOMMENDATIONS AS TO HIGHWAY SAFETY.

WE RECOMMEND:

1. That lawyers study and support all wisely conceived programs aimed at the prevention of highway accidents and injuries.

(Same as the Majority's H, 1.)

I. RECOMMENDATIONS AS TO THE COTTER PLAN.

WE RECOMMEND:

We recommend rejection of the Cotter Plan.

(The Majority favors half of the Cotter Plan but the numerous statutes which were prepared and put together to make up the Cotter Plan as introduced in the State of Connecticut are very poorly drafted and contain significant errors and omissions. In my own recommendations I have favored comparative negligence, advance payments under proper safeguards and experimentation with the Philadelphia Arbitration Plan.)

Minority Report

A.

"PURE" COMPARATIVE NEGLIGENCE VERSUS
THE WISCONSIN "50 PERCENT BAR" RULE

I must respectfully dissent from that portion of the Majority Report which would have the nations' largest bar association embrace the Wisconsin version of Comparative Negligence, a position which has been described by thoughtful legal opinion as being a "misfit in a system designed to distribute responsibility according to degrees of fault." See Campbell, Recent Developments of the Law of Negligence in Wisconsin -- Part II, 1956 Wis. L. Rev. 4, 21. See also Morris, Torts 215-16, n. 1 (1953) (terming it a "curious failure").

Dean Prosser, who knows better than anyone the mutations of the limitations various states have placed upon their apportionment acts, concludes that if he were attempting to draw an act for a legislature, he would avoid "slight and 'gross' negligence, and the 'lesser' negligence of the plaintiff, as the pestilence. They do not strike at the root of the difficulty; they leave the damages undivided in too many cases where the division should be made; and they lead inevitably to many difficult appeals abounding in confusion." Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 508 (1953). The redoubtable Dean Prosser also instructively tells us that: "It appears impossible to justify the rule on any basis except one of pure political compromise. It is difficult to be happy about the Wisconsin cases, or to escape the conclusion that at the cost of many appeals they have succeeded merely in denying apportionment in many cases where it should have been made." Prosser, *Id.* at 494. No rule is settled until it is settled right. The Wisconsin approach is a giant step in the wrong direction.

I propose that we favor a principle of "pure" comparative negligence, such as is embodied in the Mississippi statute, which is a paradigm of the principle of proportioned fault and a model of brevity, simplicity and equity. It provides that plaintiff's contributory negligence shall not bar recovery, "but damages shall be diminished by the jury in proportion to the negligence attributable" to plaintiff. Miss. Code Ann. §1454 (1956). Under the Wisconsin statute, there is to be a similar diminution of damages if plaintiff's contributory negligence "was not as great as" defendant's, but if it is as great or greater, plaintiff's negligence is still a bar. Wis. Stat. §331.045 (1955). It is clear that this "50 percent bar" rule betrays in too many cases the just principle of apportionment of damages. Thus, Professor Keeton has pointed out:

"The 'pure' form of comparative negligence seems the superior rule of apportionment. It is difficult to justify discriminating between the case in which the plaintiff is a little more negligent than the defendant and the case in which the defendant is a little more negligent than the plaintiff. Apportionment seems a fairer solution in both cases than making one party bear all his own loss. Moreover, in one sense, the more limited form of comparative negligence would only aggravate this unfair discrimination if it really worked according to its theory, because the party a little more negligent would bear all his own loss plus a little more than half the loss flowing from the injury to the other. The fact that we may believe that as a practical matter it would not work that way--that juries would still blink at the greater negligence of the more severely injured person so as to allow compensation--is no good reason for adding to the pressures of sympathy as this rule would do. It would add a new pressure to find the defendant at least more negligent than the plaintiff so as to evade the rule that the more severely injured but more negligent plaintiff is supposed to receive no compensation at all." Keeton, Comment, 21 Vanderbilt L. Rev. 906, 911 (1968).

Under the Wisconsin version, if the plaintiff is found to be charged with 50% of the total negligence, he recovers nothing. The restriction probably springs from a dyspeptic distrust of the jury system and phobic fear that, absent the "50% bar," the jury would misbehave, giving the plaintiff something in every case, even where the defendant was not negligent at all or was at fault only 1% of the total. But this obsessive fear of Robin Hood juries, who rob non-negligent, habitual defendants to redistribute wealth and productive funds to injured plaintiffs, ignores the fact that the court still has control over an unjustified, off-the-rails apportionment, that a 1% recovery will be ⁱⁿsignificant and less than the nuisance value of the suit. Dean Prosser, who, of course, has exhaustively studied the subject, concludes that he ". . . has found no such cases." Prosser, *supra* at 494.

Another inconsistency in the Wisconsin approach is illustrated by the case in which a plaintiff is 40 percent responsible for his injury. "He can recover 60 percent for his loss from a single tortfeasor; however, if there are two equally negligent co-tortfeasors, the plaintiff can recover nothing from either of them. Each defendant would be only 30 percent responsible for the loss, therefore a 40 percent responsible plaintiff could recover from neither of them. Thus, whether a plaintiff may recover

may be fortuitously determined by the number of persons responsible for the loss." Walsh, Comment, 1967 University of Illinois Law Forum 351, 359. This illogical and unjust result flows from the fact that under the Wisconsin approach the separate negligences of multiple defendants has to be individually compared, so that the plaintiff can recover nothing where his negligence is greater than that of either defendant. Furthermore, Dean Leflar highlights the following incongruity of the Wisconsin view. "If a plaintiff's negligence were fixed at 30 percent, one defendant's at 15 percent, and the other defendant's at 55 percent, the plaintiff would collect nothing from the 15 percent party but would collect 70 percent from the 55 percent party. And a plaintiff would collect 85 percent from all the defendants as joint tortfeasors in a case in which his negligence is rated at 15 percent, while the multiple defendants are rated at 40 percent, 25 percent, and 20 percent respectively." Leflar, Comment, 21 Vanderbilt L. Rev. 918, 925 (1968).

The depressing result of the Wisconsin approach of limiting apportionment to situations in which the negligence of the plaintiff is "less" while that of the defendant is "greater" in comparison is that it incites migraine in the judicial process; emasculates apportionment where the fault of the parties is anywhere near approximately equal; generates excessive, prolix and costly appeals, in which the court is asked to unscramble, scrutinize, and second-guess a jury's findings of comparative fault; and in a sizeable group of situations frustrates and defeats the vital core of the apportionment principle.

In addition to favoring a "pure" comparative negligence approach, I also favor no off-set. Thus, assume the following case which is postulated by Professors Keeton and O'Connell:

"Suppose an accident in which X was 70 percent negligent and suffered a \$30,000 loss, and Y was 30 percent negligent and suffered a \$5,000 loss. If there was no insurance and a rule of pure comparative negligence applied, X would bear 70 percent of the total loss of \$35,000 or \$24,500, and Y, 30 percent of the total loss or \$10,500; Y would bear all of his \$5,000 loss and would be obliged to pay X \$5,500; X would bear \$24,500 of his loss (\$30,000 less the \$5,500 he obtained from Y). If there was insurance and Y's insurer was entitled to an off-set, it would pay only Y's liability to X (\$5,500). And of the total loss of \$35,000, only \$5,500 would be covered by insurance. In contrast, if no off-set was allowed, Y's insurer would pay 30 percent of X's loss, or \$9,000, and X's insurer, 70 percent of Y's loss, or \$3,500 so that of the total loss of \$35,000, \$12,500 (\$9,000 plus \$3,500) would be covered by insurance." See Keeton-O'Connell, Basic Protection For Traffic Victim, 521, 522, n.8.

See also Leflar & Wolfe, Panel on Comparative Negligence and Liability Insurance - Must the Insurer Reimburse the Insured for his Personal Loss Credited Against the Judgment?, 11 Ark. L. Rev. 71 (1956).

The Majority Report cites an article by two Wisconsin lawyers, Heft and Heft, Comparative Negligence in Wisconsin, 55 Amer. Bar Assoc. J. 127 (1969), who favor their state's version of the comparative negligence doctrine. With all respect to the authors I feel that a careful reading of that article will supply sufficient reasons for the rejection of the Wisconsin rule. (Note the dismaying, complicated special verdicts required in a simple two car collision. The reason for including the names of the dissenting jurors and the number of questions to which those jurors dissented is obvious. See our discussion of Special Verdicts in the Minority Report).

Unfortunately the Majority did not cite the views of the Hon. E. Harold Hallows, Chief Justice of the Wisconsin Supreme Court, and the author of brilliant decision in Bielski v. Schulze, Wis., 114 N.W. 2d 105 (1962) dealing with contribution and hailed by Heft and Heft, *supra*. Chief Justice Hallows in addressing the Annual Convention of the Federation of Insurance Counsel on August 2, 1968, said (19 Fed. Ins. Counsel Q. 71):

"While I believe that comparative negligence is an answer to many of the ills which now confront the automobile tort field, I must point out that even the Wisconsin system may be improved. While there was a practical legislative justification in the beginning for keeping contributory negligence as a bar in some situations, the current needs of society require a comparison of the full range of negligence. Completely barring recovery because one is 50 percent negligent or equally negligent is as unjust as barring all recovery for being 1 percent negligent."

In Lawver v. Parks Falls, 35 Wis. 2d 308, 151 N.W.2d 68 (1967) Chief Justice Hallows wrote a concurring opinion in which, in his own words before the Federation of Insurance Counsel, he suggested "that the requirement of a lesser percentage of negligence on the part of one seeking a recovery was artificial and unjustified and ought to be abolished". He said that this suggestion was "the equivalent of advocating that Wisconsin adopt the pure comparative negligence rule". And he concluded:

"This is justified because the basic reason for the existence of the doctrine of comparative negligence is social justice and a modified form which denies such justice in some cases produces only modified justice.

In our modern world one can hardly live a day without fault or negligence as we have come to know it. One should be liable to the extent of his fault and should be allowed to recover for the fault of another to the extent of that person's fault and to the extent of his own freedom from fault. Barring a plaintiff from recovery for his injuries because he is at least as negligent as the defendant is as outdated as governmental charitable, religious and parental immunity, and as unjust as contributory negligence in its full force. I see no justice in recovery only if you are less at fault than the other person."

B.
SPECIAL VERDICTS

I am also compelled to dissent from the Majority's recommendation that a "special verdict" procedure be adopted. The history of special verdicts is "a rocky road strewn with innumerable wrecks." See James, Civil Procedure, 294 (1965). It is no wonder that special verdicts are little used in this country. See 2B Barron and Holtzoff, Federal Practice & Procedure, §1051 (Wright ed. 1961). In one jurisdiction where they are used, the rules which have developed as to their use have been so complex and artificial that the whole procedure is described by a distinguished authority as a "nightmare." See Green, Blindfolding the Jury, 33 Tex. L. Rev. 273, 278 (1955).

Before proceeding to a presentation of some of the day to day practical problems posed by the special verdict, I believe it important for us to note the important policy considerations which form the basis of the general verdict and which are endangered by the fallacy-laden special verdict. This has been aptly and cogently stated by Professor Moore as follows:

"Those who condemn the jury system and the general verdict proceed on the assumptions that all law is complicated and that all jurors are incompetent or dishonest. The fallacy in these assumptions, . . . is demonstrated by the few general verdicts that are set aside as being against the weight of evidence. Also the general verdict, at times, achieves a triumph of justice over law. The jury is not, nor should it become, a scientific fact-finding body. Its chief value is that it applies the 'law', oftentimes a body of technical and refined theoretical principles and sometimes edged with harshness, in an earthy fashion that comports with 'justice' as conceived by the masses, for whom after all the law is mainly meant to serve. The general verdict is the answer from the man in the street. If on occasion the trial judge thinks the jury should be quizzed about its overall judgment as evidenced by the general verdict, this can be done by interrogatories accompanying the general verdict. But if there is sufficient evidence to get by a motion for directed verdict, then the problem is usually best solved by an overall, common judgment of the jurors--the general verdict.

The General verdict is not simply a device for defeating logic and the law. It is a medium through which the people effectively express themselves and individually participate in their government. While the

special verdict does not constitute an infringement of the constitutional guarantee of a jury trial, it is a mode of quizzing the jury, and a means of limiting the role of juries in the administration of justice. The general verdict is founded upon faith in the judgment of fellow-men. Further the notion that issues of fact' are easily framed is unsound." 5 Moore, Federal Practice, §49.05.

In a similar vein, James Bradley Thayer well summed up the problem over seventy years ago as follows:

"Logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts, so that the true significance of ascertained facts might be ascertained and declared by the one tribunal fitted to do this finally and with authority. But considerations of policy have called louder for leaving to the jury a freer hand." Thayer, Evidence 218 (1898).

Similarly, Lord Coke is reported to have observed "the jurors are chancellors." Pound, An Introduction to the Philosophy of Law 133 (1922). Likewise Holmes said:

"One reason why I believe in our practice of leaving questions of negligence to them is what is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount--a very large amount, so far as I have observed--of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community." Holmes, Collected Legal Papers 237-238 (1920).

Dean Roscoe Pound concluded that "jury lawlessness is the great corrective of law in its actual administration." Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 18 (1910). One of America's ablest judges, Chief Justice Traynor of the California Supreme Court has admonished us that "we would lose more than we would gain by a reform of fact-finding that would only compel righteous adherence [by juries] to wrong rules" and that until the rules are altered, society is benefited by "that quiet distortion that presently adapts them to the needs of a rough justice." Traynor, Fact Skepticism and the Judicial Process, 106 U. Pa. L. Rev. 635, 640 (1958).

In addition to the foregoing impressive array of authorities, the general verdict has been staunchly defended and the special verdict vigorously castigated by two Justices of the United States Supreme Court.

"If there are to be amendments, Rule 49 should be repealed. That rule authorized judges to require juries to return 'only a special verdict in the form of a special written finding upon each issue of fact' or to answer 'written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict' in addition to rendering the general verdict. Such devices are used to impair or wholly take away the power of a jury to render a general verdict. One of the ancient, fundamental reasons for having general jury verdicts was to preserve the right of trial by jury as an indispensable part of a free government. Many of the most famous constitutional controversies in England revolved around litigants' insistence, particularly in seditious libel cases, that a jury had the right to render a general verdict without being compelled to return a number of subsidiary findings to support its general verdict. Some English jurors had to go to jail because they insisted upon their right to render general verdicts over the repeated commands of tyrannical judges not to do so. Rule 49 is but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments. A scrutiny of the special verdict and written interrogatory cases in appellate courts will show the confusion that necessarily results from the employment of these devices and the ease with which judges can use them to take away the right to trial by jury. We believe that Rule 49 be repealed, not amplified." Statement by Justices Black and Douglas, 31 F. R. D. 617, 618-619.

In light of the sound and convincing arguments made by these distinguished authorities, I feel compelled to align myself with the position asserted by America's foremost experts on procedure, Professors James and Moore, that the alleged advantages of the special verdict are generally outweighed by the positive, significant and substantial justifications for a general verdict. See James, Tort Law in Midstream. Its Challenge to the Judicial Process, 8 Buffalo L. Rev. 315 (1959); Moore, Federal Practice §49.05 at 2218.

In addition to the foregoing rationale, which should suffice by itself for us to reject the special verdict procedure, the special verdict injects unnecessary practical problems into a trial. One judge has pointed out that in some cases it is difficult to formulate a satisfactory special verdict either in the form of fact questions or fact findings. See Driver, The Special Verdict--Theory and Practice, 26 Wash. L. Rev. 21, 25 (1951). Even a strong proponent of the Wisconsin system has conceded this point. "Without question, a special verdict (although necessary to a comparative negligence system) does complicate the multiple car collision. Recently I tried an eight-car collision that occurred in fog at night. The evidence established lapses of three to ten minutes between impacts. The questions of which collision injured whom, divisible or indivisible injuries and intervening cause almost overwhelmed me. I tried only issues of liability with sixteen lawyers for three weeks. Using a simplified verdict (later declared invalid), reduced the verdict from 128 to 58 questions on liability alone. My prayers were answered with the settlement of the case just before submission to the jury. Certainly this is unusual--but it can happen and is happening more frequently." Decker, Some Random Observations About Comparative Negligence and the Trial Process in Wisconsin, 1 Conn. L. Rev. 56, 66 (1968). Furthermore, juries appear to have more trouble reaching an agreement on special verdicts. See Driver, *supra*, at 24. In addition, there is an increasing possibility that the jury will be unable to reach a verdict and thus bring about a mistrial. Panel on Instructions and Special Verdicts Under Comparative Negligence, 10 Ark. L. Rev. 94, 95. Also, in Wisconsin, where the concurrence of less than a majority of the jury is permissible in rendering a verdict, each and every special verdict interrogatory must be answered by the same identical jurors throughout (otherwise, a mistrial must result). See *Scipior v. Shea*, 252 Wis. 204, 31 N. W. 2d 199 (1948). Finally, as a relevant, but not conclusive, factor I point out the lack of familiarity of the bar with the special verdict procedure. One federal judge has stated that despite an advance announcement on his part of his intent to submit a special verdict, "nevertheless the proposed instructions usually come in geared to the general verdict." See Driver, *supra* at 15.

Justice, equity, and the proper administration of our courts, requires a rejection of the special verdict, an unwarranted and cumbersome invasion of the province of the jury.

C.

CONTRIBUTION AND COMPARATIVE NEGLIGENCE

My major difficulty with this aspect of the Majority Report is its apparent oversimplification of an extremely complex area of the law by its limitation of discussion to only one phase of a much larger subject. One learned observer has pointed out that the task of compiling a workable statute in this corner of the law "is not an enviable task." See Gregory, Loss Distribution by Comparative Negligence, 21 Minn. L. Rev. 1, 18 (1936). Yet, the Majority Report makes no effort to come to grips with such problems as the effect of insolvency or immunity of one of multiple defendants, see Dobbs, Comparative Negligence, 9 Ark. L. Rev. 357-371 (1955), and the problems of evaluation of the contributing fault of one who is not a party to the action, and of the second suit against him in which the first may not be res judicata and a new jury may come to a very different conclusion. See Prosser, *supra* at 503. In addition, no attempt is made to treat the problems existent under the doctrine of imputed negligence, such as obtain where two of the multiple parties are in a master-servant or joint enterprise relationship. For example, assume that M's servant S, driving M's truck collides with T. Both S and T were negligent. P, a negligent pedestrian, is injured. This problem poses intricate problems of contribution in that M was not personally at fault but only vicariously so. Furthermore, the complexity of the problem is compounded even further if M was also guilty of personal negligence. See Gregory, Legislative Loss Distribution in Negligence Actions, 151 (1936).

The Majority Report favors the Wisconsin approach to comparative negligence. Assume an accident involving multiple defendants in which P's negligence were fixed at 30 per cent, X's at 15 per cent, and T's at 55 per cent. P, under the Wisconsin approach, would collect nothing from the 15 per cent party, but would collect 70 per cent from the 55 per cent party. May T obtain contribution from X even though X was not personally liable to P? Such a question might be raised if, as the Majority recommends, the "common liability" test for contribution is displaced by a standard of the degree of "causal negligence". Furthermore, what does the majority report mean by "causal negligence"? Even the Wisconsin courts have not clearly indicated whether this means proportion of causation or proportion of negligence. See Leflar, Comment, 21 Vanderbilt L. Rev. 918, 925 (1968).

D.

AUTOMOBILE GUEST STATUTES

Although the Majority devotes a little over one page of its Report to this vexing problem it does not "regard the guest statute situation as a major criticism". It concludes:

"The decision to retain or repeal is an uncomplicated one and should be left to the states having such laws, without recommendation from us".

Consequently the Majority's Recommendations omit all reference to the subject.

The "guest statute situation" is certainly as "major" a criticism as governmental immunity or the difficulty in getting doctors into court on time as to which the Majority recommends the use of video tapes. And if the decision to retain or repeal is an "uncomplicated" one, then it should not be too complicated for the Committee. Our refusal to make a recommendation to the several states is an abdication of the responsibility we were given by the House of Delegates.

The American Bar should take a forthright position on this highly controversial matter. We should recommend the repeal of guest statutes.

The Majority would leave the Association in a most ambiguous if not utterly inconsistent position if some of the other recommendations of the Majority should be accepted. For example, the Majority recommends the adoption of the Wisconsin type of comparative negligence and some method of bringing about contribution among joint tortfeasors. If guest A is riding with B whose car collides with C, A can not recover from B in many guest statute states unless he can prove B guilty of wilful and wanton misconduct. In such a state, upon failure of such proof as to B, the entire load of damages might fall on C unless the comparative negligence statute made C liable for only that proportion of A's damages caused by C's negligence. This would leave the innocent guest without full compensation, an obviously unjust result.

The inconsistency of guest statutes in a comparative negligence state is set out by the following commentator:

"The policies of the two statutes, while possibly consistent in the abstract, come to a head-on clash when the facts would seem to allow recovery by a host against a guest, but not the other way around. That such a situation may arise may be unlikely; but it is by no means hard to imagine. An every day occurrence, for example: a host asks a guest to see if anything is approaching from the right; the guest glances out his window, tells the host to go ahead, and the car is promptly struck by a 20-ton truck proceeding up the highway at fifty miles per hour. Both the host and guest in such a situation may be negligent. But unless the host is wantonly negligent, and it does not seem that he would be in such a case, he may recover against the guest (or perhaps it will be against the estate of the guest)." See Dobbs, Comparative Negligence, 9 Ark. L. Rev. 357, 372 (1955).

The Majority also recommends further study of the so-called Cross-Over Medical Plan guaranteeing all persons injured in a collision certain medical payments. This is espoused by the Majority on "humanitarian" grounds. In the illustration given above, applying the Cross-Over Medical Plan, C's insurer would pay medical benefits to A and B even though C was not at fault. But in a guest statute state if B was only negligent and not guilty of wilful and wanton misconduct A could recover no tort damages from anyone unless he could show that C was negligent. In such case C would be forced to pay the entire amount of damages without contribution from B.

Clearly the most inconsistent position of the Majority appears from a comparison with its position as to the parent-child and inter-spousal immunities, both of which it would abrogate. In a guest statute state the child and wife passengers could recover nothing despite the elimination of the immunities. They could recover only if the father-husband ran them down in the street or injured them while they were riding in another automobile. Yet the danger, if any, of collusion exists in both cases. Thus, what the Majority would give with one hand, it would take away with another.

The guest statutes bar from recovery the very ones whom all of us are most anxious to see fairly treated, the ones we love, our families and friends. The total stranger in some one else's car could not only recover his medical from us under the Cross Over Plan but can, in guest statute cases, recover his tort damages-- all of them -- from us and not that someone else in whose car he was riding.

Leading commentators and jurists favor the abrogation of these statutes. Dean Prosser has stated: "The typical guest act case is that of the driver who offers his friend a lift to the office or invites him out to dinner, negligently drives him into a collision and fractures his skull - to which the driver and his insurance company takes refuge in the statute, step out of the picture, and leave the guest to bear his own loss. If this is good social policy, it at least appears under a novel front." Prosser, *the Law of Torts*, p. 191 (3rd Ed. 1964).

Dean Pedrick of Arizona State Law School has indicated: "At an early stage in automobile litigation and at a time when automobile insurance companies were concerned with limiting their function as far as possible, a strange alliance between insurers and farm groups secured passage in a number of states of the 'automobile Guest Statutes' It is a tribute to the lobby system of legislation that in this country a surgeon operating on a charity patient is bound to exercise ordinary care but is permitted, should he drive his patient home from the hospital, to abandon that standard and be subjected to liability only on proof of gross negligence or wilful and wanton misconduct." Pedrick, Taken for a Ride: The Automobile Guest and Assumption of Risk, 22 La. L. Rev. 90 (1961).

Professor James has concluded: "Not only are the statutes in derogation of the American law, but they cut and thwart a vital trend in American tort law towards obliterating degrees of care and fashioning the law of negligence into a less imperfect means for securing compensation to accident victims. The purposes of the statutes were to scotch 'the proverbial ingratitude of the dog that bites the hand that feeds him', and to put the barrier in the way of vexatious litigation -- the vexation presumably which would result from dishonest collusion between guest and host against the host's insurance carrier. But if there is dishonesty, it will not stick at fabricating whatever relationship the law requires." Harper & James, *Torts* §16.15, p. 961.

Chief Justice Kenison of New Hampshire has stated: "The automobile guest statutes were enacted in about half the states, in the 1920's and early 1930's, as a result of vigorous pressures by skillful proponents No American state has newly adopted a guest statute for many years. Courts of the states which did adopt them are today construing them much more narrowly, evidencing their dissatisfaction with them." *Clark v. Clark*, 222 A. 2d 205, 210, (N.H. 1966). Similarly, Justice Heffernan of the Supreme Court of Wisconsin has stated: ". . . The application of the rule of ordinary negligence, rather than gross negligence or 'wanton or wilful' conduct makes better socioeconomic sense in modern America. It is a sounder law. It (the guest statute) is an anachronism."

It has been contended that insurance companies will be victimized by collusive law suits. There are a number of solid replications to this argument. First of all, there are methods of detecting and exposing collusion, such as the great legal engine of cross-examination, surveillance movies, pre-trial discovery, and argument to the jury. As Chief Justice Traynor has said: "The fact that there may be greater opportunity for fraud

of collusion in one class of cases than another does not warrant courts in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial process to ferret out the meritorious from the fraudulent in particular cases." *Emery v. Emery*, Col., 289 P. 2d 218, 224-25 (1955). Second of all, the insurance carrier is afforded some measure of protection by the usual condition in the policy requiring cooperation between the insured and the insurer. *Harper & James, Torts*, §8.11, p. 650 (1956). This specious argument also displays a substantial lack of confidence in the legal profession. Lawyers are not apt "to encourage litigation which has no merit, particularly where the customary fee arrangement is a contingent one." *Balts v. Balts*, 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966).

Furthermore, I have serious doubts as to whether guest statutes really do produce lower insurance rates. One commentator has pointed out:

"Do guest statutes really produce lower insurance rates? In an attempt to find the answer to this question the writer sent letters to the state insurance departments in each of the forty eight states (1958) requesting the average rate in each state. Most officials replied that because of widely varying rates, as determined by classifications and territories within their respective jurisdictions, average rates were not available. However, thirteen states gave average, state-wide bodily injury, private passenger car rates based on schedules drafted by the National Bureau of Casualty Underwriters, which is used by all or nearly all stock companies, for \$5,000/\$10,000 limits of coverage, all in effect on August 15, 1957. Those rates were as follows:

<u>States Having a Guest Statute</u>		<u>States Having no Guest Statute</u>	
Florida	\$27.04	Louisiana	\$31.50
Kansas	30.08	Maine	21.73
Texas	20.15	New Hampshire	32.25
Utah	24.30	New Jersey	31.56
Vermont	43.00	New York	60.59
		Pennsylvania	27.85
		Rhode Island	36.98
		Tennessee	29.42

One thing is clear and undisputed. Generally speaking, rates tend to be lower in sparsely populated areas and higher in places of dense population. More people mean more cars, and more cars mean more accidents per car. It is not surprising, therefore, that the highest average given was from New York, where the overwhelming majority of people live in or very near the world's largest city, and that the lowest were from Maine and Texas, which have

many areas where one can drive an automobile for hours without even seeing another vehicle.

Note that the Florida rates are closest to those of Pennsylvania, which has no guest statute and is more densely populated than Florida. Another interesting comparison is that of the "twin states" of New Hampshire and Vermont. The rates in the former, which has no guest enactment, are substantially lower than those of the latter, a guest statute state. It is not intended to suggest that any rates are higher because of guest statutes, but there certainly appears to be no discernible trend, to say the least, toward lower rates in jurisdictions having such laws.

In an attempt to get information from all of the states the writer again wrote each state, this time asking for all rates by classifications and territories for their respective jurisdictions in the \$5,000/\$10,000 bracket. This information, or most of it, was supplied by twenty-two states only.

Information was received from eight of the Southern states. Three of these eight, Florida, Alabama, and Virginia, have guest statutes. The rates of North Carolina, which has none, appear to be lower than those of any of the eight states. The rates of Louisiana tend to be slightly higher than the others. Otherwise, the rates of these states, whether with or without guest statutes, appear to be fairly close together, except that in the territories with the highest rates the rates of Florida are the highest by a wide margin.

Over the nation as a whole the rates of states without restrictions on liability to guests compare favorably with those having such restrictions. There may be a guest statute state here and there which appears to have lower rates than a similar state without such a law, but often as not it will be discovered that rates for property damage, or for commercial vehicles, or both, are also lower in these states. Of course, guest statutes do not apply to commercial passengers, nor is it conceivable that they could logically affect property damage rates.

One can only conclude that liability insurance rates, which not only may vary widely from one state to another having similar laws but also in various territories within individual states, are determined primarily if not entirely by factors other than the presence or absence of guest states. Either (1) the smaller number of guest claims paid in guest statute states does not appreciably affect the vast, over-all costs of operation of liability insurance companies; or (2) there is a substantial reduction in such costs but the savings are not being

passed on to the policyholders; or (3) substantial savings are passed on but are necessarily spread among so many policyholders that the effect on them individually is minor, if not insignificant. See Tipton, Florida's Automobile Guest Statute, 11 U. Fla. L. Rev. 287, 305-307 (1958).

See also Comment, The Ohio Guest Statute, 22 Ohio State L. J. 629 (1961); Note, Liability under Automobile Guest Statutes, 1 Wyo. L. J. 182 (1947).

E.

TORTS AND TAXES

Under Section 104 of the Internal Revenue Code, gross income does not include the amount of any damages received on account of personal injuries or sickness. This has prompted the contention that the award for impaired earning capacity should be reduced by the estimated income tax savings which may accrue to the plaintiff from the fact that these damages will be exempt from income taxation. Fortunately, the weight of authority rejects this faulted logic, and holds that income tax consequences of the injury and the award should not be taken into consideration. See 63 A.L.R. 2d 1394; 3 Personal Injury, Actions, Defenses, Damages, §4.04 [PIADD] (1967 Supp.); Harper and James, Torts, §25.12 (1956); Harnett, Torts and Taxes, 27 N.Y.U.L. Rev. 614, 625-26 (1952); Morris and Nordstrom, Personal Injury Recoveries and The Federal Income Tax Law, 46 A.B.A. J. 274; Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio State L.J. 212 (1958); 69 Harv. L. Rev. 1495; 37 Tex. L. Rev. 77; 50 Ky. L.J. 601; 47 Corn. L.Q. 429.

The majority rule is supported by several highly persuasive arguments. First of all, deduction of estimated future federal and state income taxes would be too conjectural and speculative. See *Stokes v. U. S.*, 144 F. 2d 82, 87 (2d Cir. 1944); *Smith v. Pennsylvania R.R.*, 99 N.E. 2d 501 (Ohio App. 1950). "Presumably, like the poor, income taxes shall always be with us--but at what rates and with what exemptions?" *Jennings v. U.S.*, 178 F. Supp. 516, 532 (D. Md. 1959). In *McWeeney v. New York, New Haven and Hartford Railroad Company*, 282 F. 2d 34 (2d Cir. 1960), Judge Friendly pointed out the myriad changes in plaintiff's (who was a bachelor) tax structure which any number of feasible events might cause.

Secondly, tax calculations are arcane matters, capable of confusing a convocation of casuists, and it is reasoned that jurors are not qualified to make the complex estimates required under our technical tax structure. Intrusion of tax considerations would require the jury to estimate variations in gross income, fluctuations in the business cycle, and oscillations in future employment prospects, and to make a forecast of available exemptions and deductions, and a prediction as to changes in tax rates. Would not the jury be lost on a sea of speculation in making these "guess-estimates" and would not making these difficult determinations unduly complicate the trial process? *Highshew v. Kushto*, 134 N.E. 2d 555 (Ind. 1956); *Pfister v. City of Cleveland*, 113 N.E. 2d 366, 368 (Ohio App. 1953). An opposite result would convert every personal injury or death action into a trial of the future of the federal income tax structure. Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio State L.J. 212, 228 (1958).

Would not the parade of conflicting tax experts and the clash of their Sibylline prophecies as to future tax rates, deductions, and exemptions further extend the trial and congest crowded dockets driving trial judge and jury to the brink of collapse with mind-numbing technical rates, calculations, and oracular predictions?

Moreover, the continued presence of the exception in the Internal Revenue Code indicates a resolute congressional intent to benefit injured persons by exonerating them from paying taxes on awards for personal injury and death. If a deduction from damages were to be made for tax savings, the congressional intent to confer a benefit upon the plaintiff would be stultified. ". . . if the tax savings were deducted, the intent of Congress to confer a benefit upon plaintiff would be subverted by shifting it to defendant." 69 Harv. L. Rev. 1495, 1497.

In addition, I believe it to be unassailably true that it is irreducibly difficult to translate a variety of terrifying intangible items of damages into dollars and cents. Juries must frequently fall short of the ideal of rough justice by full compensation. This difficulty is compounded by the fearsome inroads into damage awards by the ravages of inflation. The refusal to mitigate for tax savings helps to approximate rough justice in a legal society committed to the elusive ideal of full and fair compensation for injured victims of tortious conduct. See *Cunningham v. Rederiet Vindegen*, 333 F. 2d 308 (2d Cir. 1964).

Furthermore, tortfeasors who harmed plaintiffs in the upper income tax brackets could virtually evade liability by a plea that any award would represent income already arrogated to the Internal Revenue Service. In addition, because of the fixed rule of "singleness of recovery," obliging the plaintiff under the mandate of *res judicata* to recover all his damages in one law suit, if the tax rates are reduced after plaintiff recovers his judgment, he could not return to court and ask for an offsetting increase in damages to compensate for the change.

Finally, turnabout might appear to be fair play. If the defendant may introduce into evidence plaintiff's tax benefits, why shouldn't the plaintiff be able to introduce into evidence the tax benefits realized by the defendant, including deductions for judgments satisfied and deductions for insurance premiums paid?

The Majority's Recommendation that the jury be instructed as to the tax aspects of damages on the grounds that otherwise the jury would believe the award to be taxable and would then award the plaintiff something "extra" has no foundation in fact. Such an approach would, however, be tantamount to and have the same deleterious effect as an instruction that the award be reduced by the tax saving.

F.

COMPULSORY ARBITRATION WITH A RIGHT OF APPEAL
AND TRIAL DE NOVO TO A JURY

Under "A. Recommendations Regarding Delay in the Courts", the Majority's Recommendation 19 is "the continuation of efforts to bring about a fair and workable plan for the voluntary arbitration of appropriate categories of small tort claims arising from automobile accidents . . .". The Majority adds that the emphasis should be on efforts to improve judicial procedures and administration, "and on seeing to it that the right of trial by jury is preserved, in fact and in theory." Recommendation A. 17 is that the right of trial by jury should not be abolished nor should its use be interfered with "seriously" by procedural obstacles or "unreasonably high costs." Recommendation A. 18 favors the continued use of voluntary arbitration of disputes between insurance companies "and in the disposition of claims under uninsured motorist coverage." These recommendations call for the following observations:

1. All of us agree that the right of trial by jury should not be abolished. The Report of the Majority adequately explains why that portion should not be altered. I have some doubt as to the statement that the right should not be "seriously" interfered with. Whether a right is "seriously" impaired is a matter of judgment and requires application of value standards to which the Majority gives no clue. The Keeton-O'Connell and the AIA plans claim that they preserve the right of jury trial, and, indeed, there are some who claim that those plans will breed more litigation than the present system.

2. Recommendation A. 18 may be misleading with respect to the arbitration of claims under uninsured motorist coverage. The body of the Majority Report shows that in 23 states the insurance contract can compel arbitration. In the other states such a provision is invalid. While Recommendation A. 18 would encourage the continued use of voluntary arbitration of uninsured motorist claims, the Majority takes no position as to those states where compulsory arbitration of such claims is permitted. We are left without guidance on this matter.

3. Recommendation A. 19 limits its approval of attempts to bring about voluntary arbitration to "small torts claims arising from automobile accidents." The underlined words seem to be unnecessary limitations: Aside from that, the Majority is unwilling to recommend compulsory arbitration of any type of a claim whether large or small, whether involving only property damages, and with or without a right of appeal and trial de novo to a jury, as under the Philadelphia Arbitration Plan.

The position of the Majority seems to be that it is better to give courts discretion to transfer "appropriate cases to the lower courts in which, considering the amount involved, the case should have been commenced" (Recommendation A. 15). But in such lower courts the

parties are usually permitted full-dress, expensive, delaying discovery and jury trials. (Incidentally the Majority does not recognize or seek to deal with the extremely troublesome question of improving the administration of justice in "the lower courts" where distressful problems exist).

The position of the Majority seems to be that rather than to compel arbitration, even with a right of appeal and trial de novo, it may be better to set up a system of no-fault benefits payable on a third party basis and credited against the third party's fault liability. This is the Cross-Over Medical Plan spoken of so glowingly throughout the Report and mentioned with special favor in Recommendation D. 1. It should not be overlooked that such a Plan, like that of Keeton-O'Connell and AIA, while saying that jury trial is not abolished goes a long way toward that end by providing no-fault benefits which are then removed from damages recoverable in tort actions tried to juries.

The position of the Majority against compulsory arbitration, even if there is a right of appeal and trial de novo to a jury, should also be compared with its Recommendation D. 2 recommending for further study what is misleadingly described as "the Quick Settlement Option Plan" under which an insurance company is given an option within four months after an accident to settle certain so-called (but not necessarily) small automobile claims on the basis of a maximum determined by an arbitrary multiple for pain and suffering. Again, as with the Cross Over Medical Plan mentioned above, it would appear that the Majority is willing to abolish trials by jury with respect to a very substantial volume of automobile accident claims. Thus the Majority's positions in favor of jury trials and against compulsory arbitration are inconsistent with their positions on other matters.

4. Trial by jury is an extremely valuable and indispensable method of handling numerous disputes in civil and criminal cases. However, it is expensive and, in some jurisdictions, almost inaccessible because of delay and court congestion. It is like a large crane--useful in handling tons of material but too expensive, cumbersome and difficult to obtain in picking up small objects.

Numerous, excellent suggestions made by the Majority for eliminating delay and court congestion are not new. I am convinced that the only way to eliminate these problems in some areas of the United States is by reducing the courts' intake of cases. That can be done either by wiping out benefits which are subject to litigation or by providing some other forum for their adjudication. I prefer the latter. The best solution

in some jurisdictions is to compel the arbitration of certain categories of cases (auto and other), granting the right of appeal and trial de novo before a jury as in the Philadelphia Arbitration Plan.

The beneficial results which would follow are numerous:

- a. Reduction in delay of disposition of the claims.
- b. Relief from court congestion.
- c. Preservation of jury trial.
- d. Reduction in litigation costs, through elimination of juror's fees

in unappealed cases, elimination of expensive court facilities and personnel, elimination of costly mechanics of pleadings and discovery, encouraging the parties to agree to the use of medical reports rather than expensive, seldom-on-time, and often unavailable experts, etc.

e. Shortened hearings permitting attorneys to charge smaller fees. The total income of the bar would not be reduced since the bar could handle more cases and the litigants would be encouraged to try them out rather than to settle for other reasons, i.e. delay and increased costs of jury trials.

f. Reduction to a minimum of the alleged evil of overpayment of small claims. I have grave doubts that a case can be made out that at the present time such claims are, as a whole, overpaid. But if such a practice exists, compulsory arbitration would go a long way to eliminate it. If so, insurers would, presumably, be more generous in paying the so-called under-paid seriously injured claimants.

A great deal of excellent material is available to show that few cases arbitrated under the Philadelphia Plan are appealed for trial de novo to a jury and most of those appealed are settled without trial. The written materials available also support the list of benefits enumerated above.

I have long been and will ever be a stout defender of jury trials. However, if delay and court congestions in a few large metropolitan areas is as serious as some say it is, compulsory arbitration with a right of appeal and trial de novo to a jury is an acceptable alternative to the total or partial abolition of trial by jury and the total or partial limitations upon fair compensation proposed by the Keeton-O'Connell, AIA, Cotter and other Plans including the Cross Over Medical Plan and the Settlement Option Plan espoused with such favor by the Majority.

Finally, I am prepared to say that the Board of Governors of the American Trial Lawyers Association has officially adopted the position which I have outlined with reference to compulsory arbitration. We have taken this stand because it now seems necessary in some jurisdictions for the preservation of the fault-adversary system and the right of trial by jury.

G.

CONTINGENT FEES AND DEFENSE COUNSEL FEES

Under "E. Recommendations as to Costs" the Majority recommends that the House adopt as the official position of the American Bar Association six propositions dealing with contingent fees.

These recommendations should be rejected for the following reasons:

1. This most important field has been pre-empted by the Special Committee on Evaluation of Ethical Standards which, after five years of difficult and extended investigations and hearings, is prepared to report at the August, 1969 meeting in Dallas, Texas. The Automobile Reparations Committee in its report to the House of Delegates in January, 1969 seemed content to rely upon the then forthcoming results of the Evaluation of Ethical Standards Committee. It is now obvious that the Majority is dissatisfied with the recommendations as to contingent fees made by the Ethical Standards Committee.

Aside from protocol which would have at least required our Committee to coordinate its researches with those of the Ethical Standards Committee, the Automobile Reparations Committee made no extensive investigations of the costs of legal services or contingent fees, devoted only portions of its last two sessions to the subject, and made no special effort to obtain the views of our Advisory Commission or state and local bar associations on this subject.

At least one of the six proposals also infringes upon the area of work committed to the Special Committee on Grievance and Disciplinary Procedures. That Committee's extensive efforts and recommendations are certainly entitled to more credibility than our own brief efforts without benefit of investigations, hearing or advice of others interested in the matter.

Finally, one should consider the almost complete confusion which would result from a dual system of dealing with fees, ethics, grievances and disciplining, one of which is applicable only to automobile accident cases. Perhaps the Majority is really suggesting that its system ought to be adopted for the handling of all fees, grievances, etc. If so it should have made known its position to the other two American Bar committees appointed to deal with these questions.

2. The first of the six recommendations with respect to contingent fees states that "the contingent fee system is a valuable method of making legal services available to a person who has a legitimate claim but insufficient means to pay or retain an attorney, and its use should continue." I question the use of the word "legitimate". Almost all claims must be investigated before they can be determined to be valid ("legitimate"), and the contingent fee contract is usually entered into when the lawyer is employed. But suppose that entry into the contract be delayed until after a preliminary investigation, who shall then determine whether it is "legitimate"? If the claim is tried and lost or if it should later be abandoned as not "legitimate" shall the lawyer be condemned because he accepted employment from a person who did not have a "legitimate" claim?

I strongly object to the studied and plain inference that the contingent fee system is a valuable one only for those persons with "insufficient means" to pay an attorney. Most insurance companies which refer out their subrogation cases to counsel, do so on a contingent fee basis. Only those companies on the verge of insolvency can be said to have "insufficient means" to employ an attorney. The adoption of the Majority's Recommendations will only result in further use of house counsel and further retreat from the judicial system into inter-company arbitration conducted by lay paraprofessionals. This may or may not be desirable but it is a consequence which the Association should squarely face.

The Majority's discussion of contingent fees in its Report is drawn from a few pages of an intensive study made by the American Bar Foundation and published as MacKinnon, Contingent Fees for Legal Services (1964). But there it was clearly shown that although the historical basis for the contingent fee was indigency of the client, it has been universally accepted by the bar and the public as a proper and useful method of employing counsel even though the client might be able to afford to pay for legal services by some other method. The Majority does not make that clear in its Report, and its Recommendations constitute an implied limitation of the use of contingent fees to impoverished clients. The adoption of those Recommendations will have an impact far beyond automobile accident cases since, as MacKinnon shows, the contingent fee is widely used in many kinds of cases other than those dealing with automobile accidents or personal injuries generally. I am speaking now, not so much of the paralyzing effect upon the economic life of the bar, as the severe restriction which would ensue upon the availability of and resort to legal services.

3. The second contingent-fee-in-auto-cases recommendation of the Majority is that courts should assume "where necessary or expedient exclusive responsibility (1) in the examination, scheduling, and supervision of contingent fees and (2) in the disciplining of attorneys who have violated the rules or who have acted unprofessionally". The words "exclusive responsibility" would remove many bar associations from similar work in these fields, a recommendation about which they should have been consulted before action by the American Bar Association. The word "expedient" would grant a vast amount of discretion to courts to take action where exclusive supervision would not be necessary or even desirable. "Expediency has treacherous undertones to which I object.

4. The third contingent-fee-in-auto-cases Recommendation would ask courts to "consider the need and expediency" of requiring lawyers to file information concerning their contingent fee contracts and their closing statements. No one can object to such a requirement where needed. No one on the Committee has indicated any area in the United States where such a requirement is needed. No one on the Committee has suggested that such measures be adopted in his own state. Indeed, there is no more evidence of such a need with respect to contingent fees in auto cases than with respect to other contingent fees or, for that matter, other fees in general.

5. I have difficulty in understanding the fourth contingent-fee-in-auto-cases Recommendation of the Majority: a statement that "where appropriate" courts should promulgate a contingent fee "schedule", considering numerous factors such as the stage of the case at which it is disposed of, the "probable amount of time and effort expended by the lawyer", the complexity of the case, "the ingenuity exercised", the risk involved, "and what, in the over-all view, should constitute a fair and reasonable fee for services performed". The adoption of a "schedule" might present no difficulties if courts were not bound to the "factors" mentioned. Some are clearly inappropriate, others highly debatable, and still others either unworkable or so ambiguous as to be meaningless. It is regrettable that the haste of our effort to get something into the report on contingent fees has resulted in an ineptly worded recommendation.

6. The fifth contingent-fee-in-auto-cases Recommendation of the Majority is that "courts should provide (1) appropriate means and methods for clients to file complaints and (2) procedures for the consideration and determination of such complaints". Here we intrude into the province of another Special Committee of the Association which has devoted and is still giving much time and effort to a reform of disciplinary and grievance

procedures which, in many jurisdictions, are conducted by local and state bar associations. It might be noted that although the Majority was very careful to suggest that when judges are disciplined the "plan" for doing so should contain "safeguards for the protection of the judge and those who complain about him", no such addition is suggested in the contingent fee recommendation. This might be the appropriate place to add that almost all of the complaints about contingent fees come from the insurance companies, not the public, and that at least some of these "complaints" are directly related to the economic self-interest of insurers in keeping claimants out of the hands of lawyers. As the Report of the Majority discloses, there is little basis for the accusation that "the contingent fee breeds abuses".

7. The sixth and last contingent-fee-in-auto-cases Recommendation of the Majority would declare that referral fees "should be fair and reasonable and have direct relationship to the value of the services performed," and should be subject to "review and determination" of the court. This is directly contrary to the present Canons of Ethics and Proposed Code, both of which would divide fees on the basis of work and responsibility. I do not consider this the proper time and place to make a full exposition of my own views on this troublesome question. All of the pros and cons have undoubtedly been carefully sifted by the Special Committee on Evaluation of Ethical Standards. Most of us know that the present Canon on this subject is more honored in the breach than in the observance, that such a customary violation (or the adoption of deliberate methods to evade the Canon) is more detrimental to legal ethics than would result from a repeal of the Canon, that a strict and rigid enforcement of the Canon would cut down drastically on referrals to competent specialists, and that such a result would bring poorer legal services to the public to the benefit of no one except insurance companies. Violations of the present Canon and the Proposed Code would merely create crimes without victims. So long as the total fee is fair and reasonable lawyers should be permitted to divide the fee as they please, provided that the client is fully informed.

If any new Canons were to be adopted I suggest two recently adopted by the American Trial Lawyers Association which read:

"1. Recognizing the desire of the American public to have available a contingent fee in personal injury litigation, and recognizing the historical justification and proven value of the contingent fee in all the states, the following statement of ethical principles is announced:

An attorney entering into representation of a personal injury client should make available to the client a choice between being represented upon a basis wherein the fee shall be entirely contingent upon recovery of damages, or, in the alternative, upon the basis of a non-contingent fee predicated upon the importance of the problem involved and the services to be rendered.

In the latter case, wherein the fee shall be non-contingent, the fee may be payable periodically either in anticipation of services to be rendered or in payment of services rendered. A retainer fee may be required wherever practicable, applicable towards either the costs, the fees, or both.

If the fee is to be contingent, in determining the fee schedule and basis to be offered to the potential client, careful consideration should be given to all material factors, including, among others, the size of the potential recovery, difficulty or simplicity of establishing liability, causation, damages and collectibility, as well as the stage of progress of the claim or lawsuit at its conclusion. A higher percentage contingent fee may be appropriate as to lower or lesser amounts of recovery, with a lesser percentage applicable to larger amounts. In any event, fee arrangements should be reasonable. Ordinary litigation matters should not entail contingent fees in excess of one-third of the gross recovery; recognizing, however, that special circumstances may justify a higher or lower percentage fee arrangement.

It is recommended that all fees for services to minors or incompetents should be subject to review and approval by an appropriate court.

2. A lawyer may, with the consent of his client, associate another lawyer outside his firm with him in a particular matter. He may be required to do so by court rule, and should elect to do so whenever his client's cause needs the competence and skill of an associated lawyer.

The total fee must remain reasonable and should not be increased in contemplation of referral, but the fee may be fairly divided between the lawyers, with due consideration to the services performed, the trust and confidence reposed in the lawyer initially chosen by the client, and the responsibility assumed by each lawyer in performing the services and in counseling the client. In the event the lawyer to whom a case is referred for preparation and trial or settlement performs substantially all of the litigation services, his proportionate share of the total fee should not be less than two-thirds."

The Majority makes no recommendations with reference to costs and fees incurred in the defense of automobile cases. Its Report contains a brief discussion which in effect finds little abuse or need or "expediency" for control, supervision, etc.

However, mention is made of the fact that the Defense Research Institute, Inc. has maintained a "lively interest" in the subject however dead it might be. Its committee report published in 30 Ins. Counsel J. 519 (1963) contains a most detailed and extensive list of things which insurance counsel should and should not do to hold down costs. If there were no abuses as to defense costs, the "lively interest" and list of commands would seem wasted effort. A somewhat different view is expressed in Weston, Defense Costs: Where Angels Fear to Tread, Ins. Counsel J., April, 1967, p. 244.

The Majority's conspicuous failure to consider the knotty problem of the use by insurers of house counsel to reduce litigation costs is unexplained. The Report says that critics of the contingent fee complain that it "tends to foster. . . impairment of the objectivity and independence of the lawyer" The same objection has been made to the use of house counsel, especially those on a full-time salaried basis. Opinions differ as to whether house counsel are as competent as independent counsel, whether they are less inclined to settle at a fair level, etc. In any case, the practice would have some influence on insurance costs. It is unfortunate that the Committee did not elect to go into the matter, gather facts and opinions, etc.

The same objection applies to the Majority's significant silence on the growing practice of some insurers in using claims adjusters in negotiations with claimants' attorneys after suit is filed, at issue and even in trial. We do not know whether in the long run any costs are saved. Certainly, if our field of inquiry was as broad as we conceived it with respect to some matters, some attention to this rather controversial subject was warranted.

H.

THE CROSS-OVER PLAN (COP) FOR COMPULSORY
MEDICAL PAY REIMBURSEMENT COVERAGE

In dealing with "the wholly uncompensated victim" the Majority Report outlines a Plan for compelling every automobile owner to carry medical pay reimbursement insurance payable to drivers, occupants and pedestrians without regard to fault. In single car accidents the insurer of the automobile would make the payments. In collisions involving two or more cars, the driver and occupants of car A would be paid by the coverage on cars B and C, for example; the driver and occupants of car B would be paid by the coverage on cars A and C; and the driver and occupants of car C would be paid by the coverage on cars A and B. Any payments made would be credited upon any settlement or judgment obtained by the person receiving the payments.

The Majority Report obviously looks upon this Plan with favor although it only proposes it for further study. It extols the merits of the cross over approach without disclosing its weaknesses and rejection generally by the insurance industry.

The Majority frankly recognizes that "this concept [compulsory medical pay reimbursement without regard to fault] constitutes, in effect, a modest system of benefits based upon a strict liability [no-fault] concept," although the Majority also makes the amazing statement that the no-fault payments are made "within the form and framework of the tort system". Professors Keeton and O'Connell could make the same claim. They, too, provide no-fault benefits which are thus removed from the tort system.

The Majority recognizes that its proposal "might be regarded as an expression of our compassion rather than our instinct for justice", and adds, "But why not?" In answering that question the Majority sets up two straw men which it proceeds to bowl over: (1) cost, and (2) possible weakening of the deterrent effect of the tort law. But those are not the chief objections at all.

The principle objection is that adoption of this Plan would amount to a significant departure from the fault system, contrary to the House's Resolution in January, 1969, favoring "no liability without fault".

It will be remembered that the Majority favored retention of the collateral source rule. But the net effect of COP is to take the medical paid out of the fault system. It is a modification of the collateral source rule because it takes the no-fault medical insurance bought by all drivers

and uses it as a collateral source to reduce the liability payments made. It forces drivers to insure themselves against the medical losses which would otherwise be payable in full under the tort system.

COP has many more objectionable features. It removes the insured's own agent from the scene as a helpful person in obtaining medical pay recovery. It puts the liability claimant, B, into the hands of A's liability carrier who can withhold or delay the medical payments at will as a leverage in the liability settlement. It has other disadvantages, but its worst feature is a significant departure from the fault system.

The Majority has chosen the fatal path of appeasement. The only remaining issue is how fast we will be driven down that road of no return.

The Report does not indicate the size of the benefits its proposes for COP. We have seen proposals to make these payments unlimited in amount. After the adoption of COP, wage loss reimbursements, funeral expenses and payments to survivors will most certainly be added. And all of these payments will be withdrawn from the fault system under COP, despite any claim to the contrary in the Report. It is most important that the public should know that the hand that gives also takes away, that COP would force people to buy medical and, later without question, accident and health insurance from liability carriers rather than insurers of its choice, and that under the guise of "humanitarian feelings" for a few persons uncompensated under the fault system, everyone will be compelled to contribute to a pool which pays everyone, including those at fault. Indeed, with only a few modifications and extensions, but no alteration of the principle of departure from the fault system, we can easily arrive at Keeton-O'Connell and even go beyond into the AIA no-fault Plan.

COP bobs up repeatedly in the Majority Report. It appears in the summary under "Inter-relationships and Costs" and "V. Proposals to eliminate the problem of the uncompensated injured person." At that point the Majority correctly states that under a fault system some persons will not be compensated from that system. It recognizes the fact that a large number of persons today have medical, hospital and accident and health insurance, not to mention access to assistance from workmens compensation, employers' wage continuation plans, group insurance, union aid plans, pension and retirement funds, social security, Medicare, Medicaid, etc. But to answer a criticism the Majority is willing to depart from the tort system. In its discussion of costs the Majority says that

"our proposal that this [Plan] be further studied is based on humanitarian feelings". However, the Majority hastens to supply a more earthy motivation: the possibility that by paying everyone something, without regard to fault, we will "strengthen and make more certain the preservation of the values of our present system."

There will be some people who will resist being thrust into the role of what Dean Roscoe Pound called the Involuntary Good Samaritan compelled to pay through private insurers' hands (and after deductions for costs and profits) money to persons who run stop signs or drive on the wrong side of the road or violate speed limits, etc. There will be some people who will say, as others, including Professors Blum and Kalven, have said, that they, too, have humanitarian feelings, that their sympathies extend beyond those injured in automobile accidents and include those who slip in bathtubs or develop cancer of the lungs from smoking too much, and that if we are moved to pay insurance premiums for the benefit of those who do not choose to insure themselves we should do so as citizens rather than as motorists and that we should fund our generosity through state-collected taxes and state-administered welfare agencies.

There will be others to whom the appeal of "giving a little" without regard to fault in order to preserve the fault system will have an appeal. Some insurers may feel that this will head off state-owned and operated automobile, no-fault insurance. Other persons will be persuaded that an "evolutionary improvement" has been made by a Plan which will answer those critics who inveigh against the fault system because some persons remain uncompensated under it. There may remain a few of us to protest that one of the very predicates of the fault system is that some persons will not recover damages under the system. Some will point out that very, very few people today do not have collateral sources with which to pay medical expenses, that a good majority in addition are compensated for wage losses due to injury, that the Compulsory Medical Cross-Over Plan, regarded so rapturously, proposes to compel all of us to carry insurance we may not need or want to buy from automobile casualty insurers in order to pay only a few, and that the motoring public is being asked to subject itself to compulsion not out of any "humanitarian feeling" or to preserve values dear to it but to make certain the preservation . . . of our present system" as the private playground for insurance companies.

If we are truly humanitarian we should consider the proposals made in the Minority Recommendations concerning the creation of a government fund out of which all persons injured or ill from any cause may obtain payments of their medical bills and losses of income. This would not be a departure

from the fault system since the fund (as in the case of workmens compensation) would be given a lien against a tort recovery of a recipient of payments from the fund. This would internalize the costs of motoring and under good economic theory would be acceptable "resource allocation". In the form in which I propose it the claimant's attorney would be compensated by the fund to the extent of the reasonable costs of recovery on behalf of the fund. This would avoid the inequities which take place today under which many funds, and particularly those administered by governments, pay nothing on account of services rendered by a claimant and his attorney in recouping payments on behalf of the fund. See Moore, Federal Medical Care Recovery Act, 55 Am. Bar. Assoc. J. 259 (1969).

I do not pretend that my suggestion is a new one. If the fault system is dispensed with there will be no way to halt the march to a socialization of the "liability" insurance industry. But if the fault system is preserved intact, without such concessions as COP would make, government funds can be employed within the framework of the tort system to make payments to everyone injured or ill from any cause.

I.

THE SETTLEMENT OPTION PLAN (SOP)

The Majority both in its Report dealing with the so-called over-compensated claimant and in its Recommendations looks with obvious favor upon what it calls a "Quick Settlement Option Plan". It would be neither quick nor a true settlement and would be more like an insurer's privilege than an option. The Plan would operate as follows:

If the medical exclusive of x-rays does not exceed \$250 in the first four months after the injury and if the total payments exclusive of property damage do not exceed \$1,000, the insurer shall be released of all tort liability to the claimant if within four months after the accident it notifies the claimant that it intends to discharge its entire liability by paying (a) all medical and hospital expenses, exclusive of x-rays, up to \$250; (2) double those expenses; (3) 70% of wage losses (taking wages at a maximum of \$150 a week) or 70% of the "reasonable expense" (not to exceed \$100 per week) of replacing the services of non-wage earners; and (4) property damages exclusive of loss of use; provided however, that the plan does not apply if there is "dismemberment or amputation" or "permanent and serious disfigurement"; and provided further that "within ten months after the accident the claimant may obtain a judicial review of the case, and if the court finds fraud, misrepresentation, mistake, gross inadequacy of payment in relation to the injuries or exemption, the settlement is not binding, and the claimant may pursue his tort remedy, subject only to crediting amounts paid." There would be no subtraction for collateral benefits.

A. Major objections to SOP, other than its unconstitutionality.

I have made known to the Committee and will file in the American Bar Association's office in Chicago a more extensive list of my many objections to this ill-conceived Plan.

Its most objectionable features are (1) its arbitrary classification of claims, (2) its inadequate provisions for payments under a formula adding only two times the medical exclusive of x-rays for pain and suffering (3) its gift of a unilateral option to the insurer, (4) the tremendous incentive it creates for build-up of medical costs already high in our economy, and (5) the unreasonable increase in delay in the disposition of claims it will bring about.

To illustrate the utter inconsistency of the Report in its favorable treatment of SOP we have only to compare the Report's approach to the AIA No-fault Plan. The Report decries the AIA Plan's "impact on benefits". It says:

"Under the present system a person earning \$750 per month, out of work for 15 days because of painful bruises and contusions, incurring x-ray expense of \$75, hospital expense of \$150 (3 days at \$50), medical expense of \$40 (4 visits at \$10) might (if he were not himself at fault and could establish fault on the part of the other party) reasonably receive a settlement of about \$2,000. Under the stock plan he would receive about \$700."

Note in particular that the Report says that this person would "reasonably" receive \$2000. Now let us see what this same person would receive under SOP:

1. Medical bills including x-rays	\$265
2. Twice the medical excluding x-rays	380
3. 70% of time lost not to exceed \$100 per week	<u>200</u>
	\$845

It does not appear that SOP provides significantly larger payments than AIA. The latter, in fact, would add other benefits in the case of death, disfigurement or permanent impairment. In addition, the AIA Plan would pay without giving the insurer any option.

But the glaring inconsistency is to say, while decimating AIA, that \$2,000 would be "reasonable" and then saying, when lauding SOP to the skies, that such "small claims" as these are artificially inflated with a "nuisance value."

Another inconsistency between the Committee's position with reference to SOP and its position on other matters appears in connection with the Report's discussion of "Rules for the Ascertainment of Damages". There, the Majority said:

"Any system which attempts in automobile cases to fix the damage amounts by establishing a schedule of payments to be made for specific injuries is bound to involve many inequities. More than in workmen's compensation because there the range of economic loss is narrower and the problem of children, wives, retired people, and other non wage earners is not present. Such a system is too simplistic to be appropriate for making reparation for automobile caused injuries.

Efforts to escape this horn of the dilemma by a formularization of the damages in some cases only, and retaining the present system, or something resembling it, for other cases are open to both sets of criticisms - too simplistic at the lower end of the spectrum, too sophisticated at the upper."

Although SOP does not set up a "schedule" it does set up a "formularization of the damages in some cases only". It seems that the Majority has provided a sound basis for criticism of its own brain-child.

It is not without significance that at about the same time that the Committee began in September of 1968 to gestate SOP, Mr. William Cotter, Commissioner of Insurance of the State of Connecticut was working up his Plan, a part of which set up a similar proposal attempting to limit the damages recoverable for pain and suffering. Under the Cotter Plan neither the claimant nor the insurer had any option to force the other to make any payment for pain and suffering. Instead a lid on the damages was fashioned so that a claimant who incurred medical and hospital expenses of not over \$500 could not recover more than 50% of those expenses for pain and suffering. If his medical and hospital expenses exceeded \$500 he could not collect more than 100% of the excess over \$500 for his pain and suffering. Thus, if his medical expenses were \$600 he could not collect more than \$350 (\$250 plus \$100) for his pain and suffering. Of course, he could collect less than that amount.

The Majority rejects this part of the Cotter Plan because it goes too far and would encourage abuses by "the incurring of unnecessary medical expense". The Majority also seems to have difficulty with Cotter's proposal that his limitations would not apply in cases of death, permanent disfigurement, loss of a bodily member, permanent loss of a bodily function and other exceptional circumstances.

However, each of these charges can be made against SOP which the Majority, in discussing the Cotter Plan, takes one more occasion to view with affection. The chief point we make here is that the movement toward more arbitrary formulas, once begun, can not be arrested at some stopping place which the Committee finds acceptable. Once we concede the principle of "formularization of damages" the inevitable progression towards a complete collapse of the present system will have begun. The only remaining question will be "When?"

B. Unconstitutionality of the "Quick Settlement Option Plan".

The so called "Quick Settlement Option Plan" raises serious constitutional questions. It may and should be challenged on the grounds that it is a denial of equal protection of the laws, due process, and the right to a jury trial. In addition, it may be plausibly attacked as an invalid delegation of power to a private group.

1. Equal protection.

Although the United States Supreme Court has been more reluctant to interfere with state policy where economic interests, as distinguished from the "basic civil rights of man", are involved, (See McKay, Political Thickets and Crazy Quilts; Reapportionment and Equal Protection, 61 Mich. L. Rev. 665-677 (1963)), it is also true that "scarcely any other clause in the Constitution has proved itself more adaptable to the temper of the times than the equal protection clause." McKay, *id.*, at 664. Thus, in a number of recent decisions in the personal injury field, it has been held that the denial of a cause of action is violative of the equal protection clause. In Levy v. Louisiana, 391 U. S. 68 (1968), the United States Supreme Court held that a state could not constitutionally preclude an illegitimate child from recovering for the wrongful death of his mother. A series of recent decisions have held that the denial of the wife's right to recover for the loss of consortium ran afoul of the equal protection of laws clause. See Karczewski v. Baltimore & Ohio Ry. Co., 274 F. Supp. 69 (N.D. Ill. 1967); Owen v. Illinois Baking Corporation, 260 F. Supp. 820 (D. Mich. 1966); Umpleby v. Dorsey, 227 N.E.2d 274 (Ohio C.P. 1967).

It has been said that the test for determining the reach of the equal protection clause is whether there is "invidious discrimination". See Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483, 489 (1955). It is submitted that under the "Quick Settlement Option Plan" there is "invidious discrimination", since the existence of the common law tort remedy or the alternative remedy of scheduled benefits is controlled by the insurer which is not bound by any standards in exercising its discretion. Furthermore, the discrimination is evident if one assumes that the insurer may well be likely to subject the cases in which liability clearly exists under current law to the regime of scheduled benefits under the plan.

2. Due process.

A bit more difficulty is encountered in attacking the proposal on substantive due process grounds. Justice Stone has verbalized the controlling principle in the following manner: "[Judicial inquiries] where

the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." United States v. Carolene Products Co., 304 U. S. 144, 154 (1938). The party attacking the law as violative of due process must show not only that no basis for the law exists in fact, but also that the legislature could not in good faith believe such a need to exist. See Hetherington, State Economic Regulations and Substantive Due Process of Law, 53 N. W. U. L. Rev. 13 (1958). Yet, even under this standard, it is submitted that the Plan violates due process.

Let us take the case of a plaintiff who suffers a pain-inflicting whiplash injury and who incurs only minor medical expenditures, and let us assume that the defendant in the case was clearly at fault. The insurer will be likely to invoke the Plan; the plaintiff will receive substantially less than under the present system and will be precluded from suing all other persons, including other drivers, passengers, pedestrians, and doctors who may have negligently aggravated his injury. The authors of the Columbia Plan conceded that it might "work to the disadvantage of a given individual in a specific case", see 32 Colum. L. Rev. 785, 819 (1932), but that this was permissible since some weighing of the general as opposed to the individual interest was sanctioned under the Due Process Clause. But is there any rational basis for singling out the most meritorious claim (one in which liability is clear) for the worst treatment"? One of the major justifications urged for the adoption of compensation plans and of removing small claims from the tort system is the difficulties of proving negligence in driving. See Keeton and O'Connell Basic Protection for the Traffic Victim, 15-22 (1965). Yet, the "Quick Settlement Option Plan", as a practical matter, and in operation, would remove cases from the tort system which are not causing the difficulties relied upon by the proponents for change. Thus, it is to be doubted as to whether there is any rational basis for the Plan.

In addition, Justice Frantz, dissenting in Vogts v. Guerrette, 142 Colo. 527, 351 P. 2d 851 (1960) indicates that the right to recover for personal injury may be a "natural" and "inalienable" right which may not be infringed by legislation. Some analogous support for that position is to be found in Mr. Justice Goldberg's concurring opinion in Griswold v. State of Connecticut, 381 U. S. 479 (1965) in which Goldberg indicated that: "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. The Ninth Amendment read, 'The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.'" 381 U.S. 488.

Furthermore, even if federal due process standards are not infringed by the plan, it may well run afoul of state constitutional law standards. In the area of substantive due process, state constitutional law has become of dominant importance. See Freund, On Understanding the Supreme Court, 115-116 (1949). "The recent state court opinions speak in terms which are deceptively reminiscent of the Supreme Court opinions of thirty years ago." Hetherington, State Economic Regulation and Substantive Due Process of Law, 53 N.W.U.L. Rev. 226, 250 (1958).

In these opinions, the Court placed the burden of justification upon the state and in effect, required that regulatory laws be held invalid unless their relation to public welfare was clearly proved to the court. See Hetherington, State Economic Regulation and Substantive Due Process of Law, 53 N.W.U.L. Rev., 13, 22 (1958).

3. Right to jury trial.

Aside from the fact that nearly every state constitution guarantees the right to jury trial in civil actions, see James, Civil Procedure, § 8.1 (1965), it is submitted that the federal constitutional guaranty is binding upon the states through the coverage of the Fourteenth Amendment. One of the first persons to suggest this possibility was Mr. Justice Brennan. See Panel Discussion, Jury Trial in Civil Cases, N.Y.U. Law Center, Dean's Day, Nov. 16, 1963, in 12 N.Y.U.L. Center Bull. 5 (Fall, 1963). "Justice Brennan acknowledged at the outset that the seventh amendment of its own force, guaranteed trial by jury only in the federal courts, being a restriction only upon the federal government. He further acknowledged that the fourteenth amendment had not thus far been interpreted to place any similar restriction upon the states . . . But, Mr. Justice Brennan went on, many of the rights guaranteed in the first ten amendments from interference by the federal government have been incorporated into the fourteenth amendment and so placed beyond the power of the states, to curtail. Why asked Mr. Justice Brennan, should not the right to trial by jury in civil cases be treated in the same way?" Karlen, Can a State Abolish the Civil Jury?, 1965 Wis. L. Rev. 103, 105-106. In addition, the United States Supreme Court, in the recent case of Duncan v. Louisiana, 391 U.S. 145 (1968) added jury trial to the lengthening list of criminal procedures imposed upon the states under the due process clause of the fourteenth amendment.

Although Duncan v. Louisiana, was a criminal case, it contains a number of significant ramifications for civil litigation. Two of the concurring justices, Black and Douglas, specifically reiterated their thesis that the Fourteenth Amendment incorporates all of the Bill of Rights, including the Seventh Amendment's guaranty of a jury trial in civil litigation.

Even more significantly, Duncan v. Louisiana shatters the arguments presented by Keeton and O'Connell, see Basic Protection for the Traffic Victim, 496 (1965) and Karlen, *supra*, at 106-107 that the recognition of a federal right to a jury trial in civil cases in state courts would "put the Supreme Court in the position of condemning the way in which the vast majority of cases are tried in most of the civilized world. The implication of such a holding would be that the only fair trial is trial by jury." Keeton, O'Connell, and Karlen have relied upon an earlier standard which has been overruled by Duncan v. Louisiana. Mr. Justice White, writing for the majority of the court, stated: "In one sense recent cases applying provisions of the first eight amendments to the States represent a new approach to the 'incorporation debate.' Earlier the court can be seen as having asked . . . if a civilized system could be imagined that would not accord the particular protection The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental--whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty A criminal process which was fair and equitable but used no juries is easy to imagine Yet no American state has undertaken to construct such a system." 391 U. S. 149-150, n. 14. Thus, the new testing ground is narrowed to the standard "fundamental to the American scheme of justice." See Note, 82 Harv. L. Rev. 148, 151.

In passing, it should be noted that the Report of the Sub-Committee Appointed to Study the Proposed Automobile Accident Commission Plan to the Automobile Insurance Law Committee of the American Bar Association (Submitted Aug. 30, 1960) concluded: "It is the opinion of your Committee that no automobile accident compensation commission which would deprive the injured victim of a right of trial by jury on the issues of liability and damages would be constitutional, and would require an amendment to both the Federal and State constitutions before the right of trial by jury could be denied." Report, p. 130.

It may be contended, however, that the plan creates a totally new type of action so that a jury trial is not required. Yet, Professors Moore and James have indicated that if a legislature creates a right to be redressed by an action which is analogous to a common law action, it cannot deprive the parties to the action of a right to jury trial. See Moore, Federal Practice, paragraph 38.11 [7]; James, Civil Procedure, p. 338 (1965). It can be contended that the "Quick Settlement Option Plan" creates rights which are not distinct from the normal common law action. The

fault principle and the various defenses are preserved (albeit at the option of the insurer). Even under the schedule of payments, the Plan purports to compensate for pain and suffering. In addition, the collateral source rule is perpetuated. Hence, it would appear sufficiently close to the regular common law action so as to warrant the continuation of a jury trial.

4. Constitutional provisions against limiting recovery for injury or death.

Both Keeton and O'Connell and the authors of the Columbia Plan concede that there may be difficulty in states having such provisions. See Keeton and O'Connell, Basic Protection for the Traffic Victim, 504-514; Columbia Report 190. The "Quick Settlement Option Plan" is subject to the same criticism.

5. Invalid delegation to private parties.

It can plausibly be contended that this Plan constitutes an invalid delegation of power to private parties, i.e. insurers. The status of the law on this subject is summarized in Davis, Administrative Law, § 2.14. It has been suggested that a delegation is invalid unless "the ambit of discretion of the delegates be delimited by statutory standards, so that a basis for judicial supervision of their action may be provided." Note, 37 Colum. L. Rev. 447, 461. The Plan confers unfettered and uncontrolled discretion upon insurers to affect the rights and remedies of traffic victims. One should bear in mind Prof. Jaffe's caveat that: "It is undeniable that almost any imaginable group given extensive powers may oppress the minority of the group and exploit other groups." Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201, 251 (1937). The delegation of power to insurers involved under the "Quick Settlement Option Plan" would appear to be "delegation in its most obnoxious form." See Carter v. Carter Coal Co., 298 U. S. 238, 311 (1936). Furthermore, if the state may not validly delegate such functions to an administrative agency, see Opinion of the Justices, 87 N. H. 492 179 A. 344, 110 A. L. R. 819 on the ground that it contravenes our concepts of Separation of Powers, then, a fortiori, a delegation of unlimited discretionary power to one of the parties to the law suit is invalid.

CONCLUSION

The plan of the Report of the Committee is to take up some of the criticisms of the present automobile reparations system, to meet them one by one either by rejection or proposals for certain changes (compulsory insurance, comparative negligence, etc.), and to evaluate proposals for reform made by various persons over the last forty years. At the end of the Report the Committee says: "It is evolutionary improvement we seek. All of our recommendations are aimed at this objective."

At no one place in our Report do we make explicit the basic values for which we stand or the criteria we propose to use in testing whether suggested improvements will promote the realization of those values. We stand for "evolutionary improvement" but specifically disclaim knowing either the implications of historical changes which have taken place, present trends or the ultimate form which is evolving. It would thus appear that although we do not know where we are headed we are on our way with "evolutionary improvements" headed somewhere. Are we beating a slow retreat from the fault system with its individualization of damages and emphasis upon individual freedom of action balanced by individual responsibility? Is history repeating itself and are we again witnessing the rush to expanded tort liability which took place during the first quarter of this century when employers' liability laws (abolition of or limitations upon such defenses as contributory negligence, assumption of risk and the fellow servant doctrine) attempted to derail demands for the no-fault rules of workmens compensation? If "evolution" means gradual instead of abrupt transition to a collectivistic system of automatic, no-fault compensation administered by the private insurance industry (the bold proposal of the American Insurance Association), will "evolution" then be arrested? Will we then have created the best of all possible worlds or will dissatisfaction develop, as it has with workmens compensation, and will we then be prepared for state insurance and a socialization of automobile-caused losses? Will we then rest forever in Elysian fields of bliss or will we find ourselves at the end of the road to serfdom which Hayak predicted and which some bitterly protest as the present state of affairs in the administration of welfare systems in the United States?

Still and all, the pressure towards change is almost irresistible. The bar is condemned as conservative and reactionary. To demonstrate otherwise we search for "evolutionary improvement." Moreover, we are constantly reminded by those astute in the politics of resistance that it is impossible to meet a strong challenge, such as that made by Professors Keeton and O'Connell, by a dogged defense of the status quo. Not only must improvements be recommended but some Plan must be devised.

And above all - on this the revolutionists and evolutionists are agreed - costs must be held down. The fear of doing anything which will further increase the cost of motoring becomes almost pathological. As a result all Plans which propose to increase either some of the benefits paid or the total number of beneficiaries will also be found to include methods of reducing either other benefits paid under the present system or the transaction costs (expenses of acquisition, the direct and indirect costs of administration and distribution), and even the fees and expenses incurred by persons to whom payments are made.

The Report of the Committee also recommends "liability insurance or the posting of a bond or securities as a prerequisite to securing registration of an automobile." For all practical purposes this is compulsory insurance, euphemistically described at several places in the Report as "universal financial responsibility." As indicated in the Report some insurance companies have for many years opposed the adoption of compulsory insurance. Recently those who most bitterly resisted its spread beyond Massachusetts, New York and North Carolina have done a complete about-face. Those stock companies which belong to the American Insurance Association now urge compulsory accident, no-fault insurance along with their Plan to destroy the fault-liability system. It would have been rewarding to explore the reasons for this change in attitude. There are some who say - with documenting evidence to support it - that compulsory liability insurance has been withheld from the American public because insurance companies have lobbied against it through fear that compulsory insurance would open the door for government ownership of the industry. If insurance premiums are compulsory they suspiciously resemble taxes. If, in addition, every injured person will have a right to benefits even if he was solely at fault, the public may well begin to wonder why private industry should be permitted to make a profit out of collecting taxes and distributing public largesse. Furthermore, government can collect taxes and pay out benefits at a cost considerably less than private industry could do the job. The Canadian province of Saskatchewan has a virtual government monopoly on the workmens compensation type payments made under its Plan to those injured in automobile accidents. Other Canadian provinces seem headed in that direction. If our "evolutionary improvements" progress far enough - say as far as the AIA automatic-pay and no-fault Plan - the public demand for socialization of the industry may overpower even the strong insurance lobby.

My position is simply this:

First, I believe that the fault system rests on the bedrock of a sense of justice inherent in the notion that if one is innocent of wrongdoing he should not be held liable in damages to another, especially if that other person was at fault. We may have reached a turning point in the philosophy that it is society and not the individual which is guilty of lawlessness. Perhaps we need a return to, rather than a further departure from, the notion that individuals should be held accountable for their own transgressions but should be freely acquitted of responsibility if they are innocent of fault.

Second, I believe that the individual is the basic and ultimate, important unit in society, that among his inalienable rights is physical and mental integrity and freedom from harm, and that the intangible values of life, including freedom from pain and suffering and the right to enjoy an uncrippled life, are as valuable as life itself. The tort system individualizes damages and promises full and fair compensation for all damages. I have no objection to social systems which aid all persons, including wrongdoers, in cases of need. I do protest cutting down on the damages payable to innocent victims in order that wrongdoers can be paid.

I must again say with the utmost respect, that I firmly believe that the Majority Report should be received and filed, and that its Recommendations should be tabled until we obtain the results of the studies of the Department of Transportation and several Congressional Committees, and the labors and efforts of other committees of the American Bar Association.

Respectfully submitted,

Orville Richardson

June 21, 1969

SUMMARY OF ACTION

OF THE

HOUSE OF DELEGATES

AMERICAN BAR ASSOCIATION

Annual Meeting - Dallas, Texas

August, 1969

AUTOMOBILE ACCIDENT REPARATIONS (Report No. 18)

In lieu of the resolutions proposed by the Committee, the recommendation of the Board of Governors was adopted. The Board recommended that the House approve generally the recommendations of the report grouped under the headings A through J, notwithstanding that there was basis for disagreement with respect to certain of these fifty-three specific recommendations.

The Committee's resolution K was approved as follows with amendment recommended by the Board of Governors (added material underlined):

K. That persons designated by the President of the American Bar Association be authorized to support the adoption of legislation consistent with these resolutions and to oppose appropriate legislation inconsistent with these resolutions before appropriate legislative bodies and other groups with appropriate recognition, however, of points of disagreement with respect to certain of the specific recommendations.

11/21/69/cs

DIVISION OF PUBLIC SERVICE ACTIVITIES

REPORT
of the American Bar Association
SPECIAL COMMITTEE ON
AUTOMOBILE ACCIDENT REPARATIONS



Approved by the House of Delegates of the
ABA at the Annual Meeting, Dallas, Texas,
August, 1969

AMERICAN BAR ASSOCIATION
1155 EAST 60TH STREET
CHICAGO, ILLINOIS 60637

AMERICAN BAR ASSOCIATION
SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS

RECOMMENDATIONS

WHEREAS, on January 27, 1969, the Special Committee on Automobile Accident Reparations presented to the House of Delegates its report, which is described as No. 13 in the printed book of Committee and Section Reports; and

WHEREAS, said Committee's report recommended the adoption of four resolutions numbered I, II, III, and IV; and

WHEREAS, Resolution II was, at the time of presentation, amended in part; and

WHEREAS, all four resolutions, as amended, were adopted and approved in the following language, to-wit:

- I. The Special Committee on Automobile Accident Reparations be continued for the purpose of studying, evaluating, and reporting from time to time, on further proposals for changes in the system of providing reparations for those injured in automobile accidents.
- II. The present system for providing reparations for those injured in automobile accidents, based upon the concept that if there is no fault there is no liability and relying upon an adversary method of trial before a court or jury as the means of determining liability and the amount of damages, be retained as the basic legal structure for dealing with such cases but that the following proposals for further study, changes in, additions to, and modifications of such system should be further considered and a final report be submitted in time for distribution to the House 30 days before the Annual Meeting in Dallas.

(Following the above language, Recommendations A through I

with subsections, which were the subject of further study, were set forth.)

- III. Proposals that would severely reduce benefits payable to persons injured in automobile accidents or would abolish or substantially abolish the tort basis for the automobile accident reparations system, such as The Keeton-O'Connell Basic Protection Plan and the "Complete Automobile Protection Plan" announced by the American Insurance Association be opposed.
- IV. Persons designated by the President of the American Bar Association be authorized to support the adoption of legislation consistent with these resolutions, and to oppose legislation inconsistent with these resolutions, before appropriate legislative bodies and other groups.

and

WHEREAS, the Committee has further studied the subjects assigned to it and has submitted its revised report to the members of the House of Delegates of the American Bar Association thirty days before the 1969 annual meeting in Dallas, Texas, all as required by Resolution II;

NOW, THEREFORE, BE IT RESOLVED, that the following further recommendations be adopted.

A. RECOMMENDATIONS REGARDING DELAY IN THE COURTS

WE RECOMMEND:

Page reference
to text

1. The adoption and implementation of a plan, by constitutional amendment if necessary, for a unified court system with power in one of the judges to assign other judges to judicial service so as to relieve court congestion and generally to utilize the available judges to best advantage. 34
2. That adequate judicial statistics be maintained. 35
3. That in jurisdictions having many courts, or in which a need has arisen from other causes, court administrators be appointed, responsible to the chief judge or to the administrative judge, for the performance of the administrative work of the courts. 35
4. That court administrators attempt to devise, or assist the court to devise, ways of scheduling cases for trial so as to maintain to the 35

maximum feasible degree, an uninterrupted flow of cases.	Page reference to text
5. Further efforts to assure that judges be selected on the basis of merit, including the adoption by state and local bar associations of by-law provisions defining the procedures for the participation of the association in the process of judicial selection.	24-37
6. The adoption of a plan or rule under which judges, as long as they perform their duties in a satisfactory manner, are assured of adequate pay, secure tenure in office until a stated retirement age, and retirement then under an adequate retirement plan.	37-39
7. The adoption of a plan or rule under which the lazy, incompetent, aged, ill or otherwise infirm judge can be retired or, if necessary, removed from the bench, under which judicial misconduct can be subjected to discipline, but which contains safeguards for the protection of the judge and those who complain about him.	37-39
8. That voluntary waivers of jury trials be encouraged and that plans such as the Los Angeles Plan, under which panels of judges who attract jury waived cases are utilized, be experimented with in other jurisdictions.	39-40
9. That measures be taken to streamline the selection of jury panels and to shorten the voir dire without loss of its value.	40
10. That in automobile accident cases a pre-trial settlement conference be scheduled in every case, unless a party objects, and that a full scale pretrial occur in those cases in which the court or either party so requests.	41
11. That, as respects automobile accident cases, in jurisdictions which now permit the use of juries of less than 12, such smaller size (not less than 6 persons) juries should be used. Where such juries are not now permitted, provision should be made for their use.	42
12. That, as respects automobile accident cases, when a 12 person jury is employed, a non-unanimous verdict (but in which at least 9 concur) should be permitted.	42

	Page reference to text
13. That in appropriate cases video tape be utilized to present the testimony of medical witnesses.	42-43
14. That impartial medical panels be established in jurisdictions where they do not now exist and that such panels be used frequently.	43
15. That judges be given statutory power, and that it be freely exercised, to order appropriate cases transferred to the lower court in which, considering the amount involved, the case should have been commenced. When these transfers occur the jurisdictional limit of the lower court should be increased automatically to cover whatever verdict is rendered in the case.	44-45
16. Continued efforts to dispose of automobile accident claims by prompt settlement and continued efforts to make periodic payments to or for claimants pending settlement agreement or judgment. In aid of such efforts, and for other reasons, a change to the comparative negligence doctrine (which may have the effect of making total victory for either side less likely) is recommended. Removing doubts about the presence of liability insurance and as to the available limits of liability, by providing for mandatory liability insurance and by making the limits of liability discoverable also is recommended. In further aid of such efforts, devices such as Section 997 of the California Code of Civil Procedure should be tried more widely to the end that defendants are encouraged to make prompt and realistic settlement offers and plaintiffs are encouraged to accept them. Where needed, legislation to permit prompt disposition of some claims arising out of an accident without prejudice to the defense of other claims and to permit advance payments without fear that they will be construed as an admission of liability should be enacted.	48-51
17. That the right of trial by jury should not be abolished as respects negligence cases arising from automobile accidents, nor should its use be interfered with seriously by procedural obstacles or by the imposition of unreasonably high costs upon the litigants.	51-54
18. The continued use of voluntary arbitration	54-61

as a means of resolving disputes within the scope of the Nationwide Inter. Company Agreement or within the scope of the Special Arbitration Agreement and in the disposition of claims under uninsured motorist coverages.

Page reference
to text

19. The continuation of efforts to bring about a fair and workable plan for the voluntary arbitration of appropriate categories of small tort claims arising from automobile accidents, but the emphasis should be on efforts to improve the stature of the courts and their ability to do their work on time, on assuring litigants easy access to the courts for the resolution of their controversies by professional judges, and on seeing to it that the right of trial by jury is preserved, in fact and in theory.

60-61

20. That programs of judicial education be intensified and expanded and that judges, particularly new judges, should be enabled to participate in the programs at public expense.

61

21. That greater emphasis be placed on training lawyers for advocacy, both in the law schools and in continuing legal education.

61-62

22. That judges should adhere to work schedules developed by the administrative judge to the end that judicial work loads are consistent with generally acceptable standards, and that in jurisdictions where the pace of judicial performance is recognizably slow the local bar associations should, if necessary, initiate speed up programs.

63-64

23. That lawyers should not contribute to the problem of delay by being dilatory in their work, or by failing to be ready to proceed with the case when it is reached for trial.

64-65

24. That in places where excessive and unjustifiable delay in the courts now exists, the number of trial judges should be increased, and whenever the need is clear, appropriate increases in supporting personnel and physical facilities should be provided. The recommended method of assuring that the number of judges shall be adequate to meet the expanding need is a constitutional or statutory provision which creates a new judicial office and requires it to be filled upon each significant change in the ratio between the population and the number of judges.

65-66

B. RECOMMENDATIONS AS TO SUBSTANTIVE LAW

WE RECOMMEND, As Respects Automobile Accident Cases:	Page reference to text
1. That the states adopt a Wisconsin type of comparative negligence system supported by a special verdict procedure.	74-77
2. That the states which adopt the Wisconsin comparative negligence system make statutory provision for contribution among joint tort feorsors proportionate to the percentage of causal negligence attributable to each.	77-78
3. That the states in which the doctrine of contributory negligence is abolished should consider the abolition of the last clear chance rule.	79
4. That the doctrine of governmental immunity, as respects states and municipalities and their departments, commissions, boards, institutions, arms or agencies, be abrogated so as to make such defendants liable for injuries and damages negligently inflicted through their operation, maintenance or use of automobiles.	79-81
5. That the doctrine of the immunity of charitable organizations be abrogated.	81-84
6. That the doctrine of the immunity of a spouse to the tort claim of the other spouse be abolished.	84-85
7. That the doctrine of the immunity of a parent to the tort claim of his child and of the immunity of a child to the tort claim of his parent be abolished.	85-86

C. RECOMMENDATIONS AS TO THE LAW OF DAMAGES IN AUTOMOBILE ACCIDENT CASES

WE RECOMMEND:

1. That the general rules, including the collateral source rule, for the ascertainment of damages on an individualized basis be retained;	87-92
2. That additurs or remittiturs be used in those instances in which the damages awarded are excessive or inadequate;	96

3. That the jury be instructed of the fact that compensatory damages on account of torts or tort type rights are not subject to income tax;	Page reference to text 92-95
4. That statutory limitations upon damages in death cases, in those states in which the recovery is measured by pecuniary loss, be removed.	95-96

D. RECOMMENDATIONS AS TO CERTAIN CATEGORIES OF PERSONS WHO ARE INJURED IN AUTOMOBILE ACCIDENTS.

WE RECOMMEND:

1. The Uncompensated Claimant.--We recommend that a plan, termed "The Crossover Medical Plan" (under which every victim of an automobile accident, except perhaps those flagrantly at fault, who incurs medical expense as a result of an automobile accident would be paid an amount equal to that expense up to a stated amount), be studied by interested persons and particularly by the insurance industry, and that the objective results of the studies, including reasonably precise cost data and any alternative proposal for dealing with the problem of the uncompensated injured person on a third-party basis, be made available to the bar, to legislatures and to the public.	97-100
2. The Overcompensated Claimant.--We recommend that a plan, termed "The Quick Settlement Option" (under which an insurance company is given an option, if it is promptly availed of, to settle described categories of automobile accident cases for values determined by a formula), be studied by interested persons, and particularly by the insurance industry, and that the objective results of the studies, including reasonably precise cost data, and any alternative proposal for dealing with the problem of the overcompensated injured person be made available to the bar, to legislatures and to the public.	100-103
3. The Seriously Injured, Undercompensated Claimant.--We recommend several things, which are aimed more specifically at other problems, each of which are believed to contribute something toward the easing of this problem, namely: compulsory insurance, mandatory uninsured motorist coverage, increased limits of liability, removal of certain statutory limitations, replacing the contributory negligence doctrine with a comparative negligence	103-105

doctrine, assurance of at least part payment of medical expense, retention of collateral source benefits, relief of time pressure to settle by reducing delay in the courts.

E. RECOMMENDATIONS AS TO COSTS

WE RECOMMEND:

Page reference
to text

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|--|---------|
| 1. Automobile Insurance Costs.--Further and persistent effort to find better and less costly ways of providing and distributing the automobile insurance product and of performing all other automobile insurance services with optimum speed and economy. | 105-110 |
| 2. Costs of legal services in automobile accident cases.-- | 110-119 |

The Contingent Fee

- a. The contingent fee system is a valuable method of making legal services available to a person who has a legitimate claim but insufficient means to pay or retain an attorney, and its use should continue.
- b. Courts, upon whom the duty of supervising the legal profession rests, should assume where necessary or advisable, exclusive responsibility (1) in the examination, scheduling and supervision of contingent fees, and (2) in the disciplining of attorneys who have violated the rules or have acted unprofessionally.
- c. Courts should consider the need and expediency of requiring lawyers to file information on contingent fees. Requirements should be promulgated in the light of local conditions. Among the requirements that should be considered are the filing of information on all contingent fee contracts and arrangements (oral or written) with the courts and the filing of closing statements in all cases.
- d. Courts should, where appropriate, promulgate a contingent fee schedule, considering such factors as whether the case is settled before, during or after the trial;

whether a case is appealed; the probable amount of time and effort expended by the lawyer; the complexity of the case; the ingenuity exercised; the risk involved; and what, in the over-all view, should constitute a fair and reasonable fee for services performed.

- e. Courts should provide (1) appropriate means and methods for clients to file complaints and (2) procedures for the consideration and determination of such complaints.
- f. If a lawyer pays or a forwarding lawyer is paid a referral fee, the amount should be fair and reasonable and have direct relationship to the value of the services performed. Any such payment should be subject to the review of and determination of the court.

F. RECOMMENDATIONS AS TO AUTOMOBILE INSURANCE

WE RECOMMEND:

1. That states that have not done so adopt compulsory automobile insurance laws (allowing alternative methods of assuring that the defendant will be financially able to respond in damages, such as the advance posting of a bond, cash or securities) applicable to both bodily injury and property damage liability and that the required limits of liability be not less than \$10,000 for bodily injury sustained by one person as the result of one occurrence, \$20,000 for all such damages sustained by two or more persons as a result of one occurrence, and \$5,000 for property damage resulting from one occurrence. 119-124
2. That such compulsory insurance laws require that every policy issued contain uninsured motorist coverage, which includes insolvency protection. 125-126
3. Continued efforts to persuade insurance buyers that higher limits of liability than those required by law are advisable for their own protection and for the protection of injured persons. 126-127

4. That states now requiring limits of liability less than 10/20/5 change their statutes to require at least those amounts. 126-127

G. RECOMMENDATIONS AS TO THE USE OF THE TORT LAW TO
DETER DANGEROUS DRIVING

WE RECOMMEND:

1. That efforts to utilize the tort law and the insurance rating system, as well as the criminal law, to strengthen deterrence of dangerous driving be continued, and that studies be encouraged to seek further enlightenment as to how such effects can be most effectively and acceptably strengthened. 127-131

H. RECOMMENDATIONS AS TO THE COTTER PLAN

- WE RECOMMEND support for the following proposals included in the Cotter Plan: 148-155

1. That the doctrine of comparative negligence be adopted along with a special verdict procedure and that provision be made for contribution among joint tort feorsors. 148

2. That advance payments and prompt settlement of property damage claims be promoted by making clear that the payments do not constitute admissions of liability. 148

3. That stiff penalties be imposed for fraud and that the claimant should be required to cooperate in the furnishing of information and in submitting to physical examinations, our support for this proposal is conditioned upon reasonable safeguards for the claimant and his attorney being provided. 149

4. Support, in principle, for the concept that provision be made to recognize the tax free nature of damage awards. 148-149

- WE RECOMMEND opposition to the following proposals included in the Cotter Plan:

1. Mandatory arbitration of tort claims in the form proposed and under the circumstances which exist in Connecticut. 150-151

2. The mandatory inclusion in private passenger automobile liability policies of "no fault bene-

fits" on an accident and health insurance (first party) basis.

3. That awards for pain, suffering and inconvenience be limited (with some exceptions):

154-155

(a) in cases in which the medical and hospital expense is not over \$500, to 50% of such expense

(b) in cases in which the medical and hospital expense is in excess of \$500, to 50% of the first \$500 plus 100% of the "medical" in excess of \$500

4. To limit contingent fees in the manner specified in the "Cotter Plan", viz. in any event no more than 25% of the amount of the recovery unless application for greater compensation is made to the court, & authorizing any court in the state to adopt rules prescribing graduated maximum contingent fee schedules but not exceeding the 25% limitation.

149

I. RECOMMENDATIONS AS TO HIGHWAY SAFETY

WE RECOMMEND:

1. That lawyers study and support all wisely conceived programs aimed at the prevention of highway accidents and injuries.

169-174

J. THAT THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS BE CONTINUED.

K. THAT PERSONS DESIGNATED BY THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION BE AUTHORIZED TO SUPPORT THE ADOPTION OF LEGISLATION CONSISTENT WITH THESE RESOLUTIONS AND TO OPPOSE APPROPRIATE LEGISLATION INCONSISTENT WITH THESE RESOLUTIONS BEFORE APPROPRIATE LEGISLATIVE BODIES AND OTHER GROUPS.

THE AUTOMOBILE ACCIDENT REPAIRATIONS SYSTEM AND THE AMERICAN
BAR ASSOCIATION

(By Franklin J. Marryott)

The great amount of publicity about the Hart Bills,¹ calling for a national "no fault" system of paying automobile accident victims, the proposals made in New York,² the studies conducted by and the proposals being advanced by the Department of Transportation,³ and the 1970 change in Massachusetts to a partial "no fault" system,⁴ contrasted with the relative silence as to such subjects on the part of lawyers, Bar Associations in general, and the American Bar Association in particular, must cause many lawyers, as well as interested legislators and members of the general public, to question whether these groups have been very deeply concerned about such matters.

The purpose of this article is to supply an answer to such questions as respects the position of the American Bar Association.

On Feb. 20, 1968, the House of Delegates of the American Bar Association adopted a resolution calling for "a comprehensive study and investigation of the problems inherent in the prompt and fair disposition of automobile accident claims," and created a Special Committee on Automobile Accident Reparations.

Some 20 months later, after very extensive research and study, the Committee⁵ (which was assisted by a "commission" of eleven) presented its report⁶ to the House of Delegates at the Annual Meeting (in Dallas) August 12, 1969. The House adopted the recommendation of the Board of Governors to the effect that the House approve the recommendations of the report.⁷

Several years ago the Section of Insurance, Negligence and Compensation Law appointed a Committee for the Achievement of Justice Through the Adversary System. The recommendations of this Committee caused the American Bar Association to create the Special Committee on Automobile Accident Reparations.

¹ Four of the "Hart Bills" (Senator Philip A. Hart, D-Mich.) are: S. 4339 providing for a national system to reimburse automobile accident victims for medical expenses and up to \$1,000 per month for 30 months for loss of "take home pay," for payment of up to \$30,000 on account of death of a wage earner, restricting insurance cancellation to cases of nonpayment of premium or loss of driver's license, preserving tort suits for damages in excess of the "no fault" amounts on account of permanent injury or disfigurement, and for pain and suffering on account of such injuries; S. 4340 making it possible to buy automobile insurance on a group basis in states which now forbid the use of such plans; S. 4341 allowing employers' contributions to group automobile plans to be tax deductions; S. 4331 encouraging the building of crash resistant cars. No estimates of the increase in insurance costs of such a program have been published.

² See the Report "Automobile Insurance—For Whose Benefit," Feb. 12, 1970, prepared by the staff of the New York Insurance Department and known as the Stewart Report. See also, Ghiardi and Kircher, *Automobile Insurance—The Rockefeller-Stewart Plan*, INS. COUNSEL J. 324 (July 1970); Stewart, *Facing Facts on Auto Insurance Reform*, 6 THE FORUM 42 (Oct. 1970).

³ See the "Automobile Insurance and Compensation" studies prepared under Public Law 90-313 (May 1968). These are for sale by the Superintendent of Documents, U.S. Government Printing Office. See also, the statement of the Secretary of Transportation, Hon. John A. Volpe, made before the Senate Commerce Committee in October, 1970 to the effect that the Administration would recommend legislation setting automobile insurance guidelines and standards applicable to all states.

⁴ Chapters 670 and 744 of the Acts of 1970 (August 1970). See also, comments in virtually every issue of *The Standard* beginning July 24, 1970 and continuing to date. See also, article by Roger Kenney in the August 24, 1970 issue of U.S. Investor, terming the Massachusetts "no fault" law "an election year Mulligan stew of raw politics." See also, article by Thomas C. Gallagher in *The Herald-Traveler* of Oct. 9, 1970, "The Tragedy of 'No Fault,'" also editorial, *The Herald-Traveler*, Sept. 16, 1970, "One Experiment Is Enough," commenting adversely on the Hart Bills in view of the chaos in Massachusetts.

⁵ The members of the Committee were: George B. Powers, Chairman, Wichita, Kansas; Nelson C. Berry, San Francisco, California; Hon. Horace W. Gilmore, Detroit, Michigan; Raymond H. Kierr, New Orleans, Louisiana; Edward W. Kuhn, Memphis, Tennessee; John M. Moelmann, Chicago, Illinois; Hon. John T. Reardon, Quincy, Illinois; J. Ronald Regnier, Hartford, Connecticut; Orville Richardson, St. Louis, Missouri. The Reporter for the committee was Franklin J. Marryott, Wellesley Hills, Massachusetts.

⁶ The numerous recommendations of the Report were grouped under capital letter designations A-K. The Board's recommendation, which the House adopted was that the Recommendations grouped under letters A through J be approved "notwithstanding that there was basis for disagreement with respect to certain of these—specific recommendations." (An apparent recognition that the Report included a minority report by one member of the committee.) Recommendation K, pertaining to authorization of designated persons to support legislation consistent with the resolutions, was amended by adding "with appropriate recognition, however, of points of disagreement with respect to certain of the specific recommendations."

⁷ Twelve hundred copies of the Report were printed and presented to or sold to interested persons. The price was \$3.50. At this time no further copies are available but reprinting is being considered.

known as the Powers Committee. The Section's concern with the recommendations of the Powers Committee is indicated by the statement of its Past Chairman, Louis G. Davidson, "One of the paramount tasks we will have to undertake this year and in the years immediately following is the effective implementation of the recommendations contained in the report of the American Bar Association's Special Committee on Automobile Accident Reparations."⁸

The Section's Committee for the Achievement of Justice Through the Adversary System has continued.⁹ It has as one of its objectives the implementation of the Powers Report. It is expected that various members of the Section will be called upon to assist the Committee to carry out its assignment, viewed by many as one of the most important and significant tasks that any lawyer's group could assume.

The concept which underlies the specific Recommendations of the Report is that the present system for providing reparations to those injured in automobile accidents should be retained, as the basic legal structure for dealing with such cases, but that a number of changes should be made.

From the beginning the Committee viewed the concept that "if there is no fault there is no liability" as central to the present system and regarded the "adversary method of trial before a court or jury" as an important characteristic of the system which should be retained. Nevertheless, its recommendations are by no means aimed at mere preservation of the existing status but rather reflect a keen awareness of the criticisms that have been made and a recognition that the Bar should act affirmatively to discard rules which have outlived the reasons for their existence and should devise innovative changes to improve the system.

Among the values of the present system which the Committee wished to retain were: individualized compensatory damages, general deterrence of negligent conduct, the availability of a convenient way of bringing safety efforts into meaningful focus by penalties in the form of higher insurance charges upon those with bad driving records and specific rewards for those who are accident free.

There was also a strong feeling that it is important to continue to hold persons legally responsible for their own acts, that the tort law is making a useful contribution to society by reinforcing the moral values which underlie the almost instinctive feeling that persons guilty of wrongful conduct should be held accountable, that formalized outlets for the emotions of indignation, revenge and self justification (which the tort law now provides) are of value and that it is not satisfactory to rely wholly upon the criminal law to supply such outlets. It was felt that the extension of "permissiveness" to the field of tort law was undesirable. There was also a belief that the significance of legal responsibility was not destroyed by the fact of the usual availability of insurance.¹⁰

The Committee, being practical-minded people, understood very well the difficulties in enacting legislation which makes drastic changes in well-established and deep-rooted ways of doing things and were skeptical indeed toward assertions that the general public desired far-reaching changes in the automobile accident reparations system, a feeling which seems well borne out by public opinion surveys made or published subsequent to the date of the Report.¹¹

⁸ Davidson, *Chairman's Report*, 5 THE FORUM vi (Oct. 1969).

⁹ This Committee is under the chairmanship of Hon. Edward W. Kuhn, former President of the American Bar Association. The other members are: James Dempsey, White Plains, New York; Richard W. Galihier, Washington, D.C.; J. A. Gooch, Fort Worth, Texas; Raymond H. Kierr, New Orleans, Louisiana; Frinklin J. Marryott, Wellesley Hills, Mass.; John M. Moelmann, Chicago, Illinois; Elijah G. Poxson, Jr., Detroit, Michigan; J. Ronald Regnier, Hartford, Connecticut; Orville Richardson, St. Louis, Missouri; Wallace E. Sedgewick, San Francisco, California; Roger H. Smith, Toledo, Ohio; W. O. Shafer, Odessa, Texas; Walter Steele, Denver, Colorado.

¹⁰ See pp. 16 and 17 of the Report of the Special Committee, hereinafter cited as "The Report." See also p. 127.

¹¹ See "The Consumer Speaks Out On Automobile Insurance," J. AM. INS. (Sept.-Oct. 1970). The survey reported on disclosed that 64.7% of those questioned were opposed to the elimination of damages for "pain and suffering" as a means of reducing insurance costs; 57.9% were opposed to the idea of "no fault" plans; 66.1% were opposed to the idea of having automobile insurance pay only after the injured person had used up his "collateral" sources such as Blue Cross and "sick leave" benefits. See also, the Report of the Survey Research Center of the Univ. of Michigan to the Department of Transportation printed in the Volume "Public Attitudes Toward Auto Insurance," a part of the DOT Automobile Insurance and Compensation Study. See especially pp. 72-73 where it is reported that 50% of car owning families favored the present system even when the question asked describing the system was obviously "loaded" by reason of its failure to reflect the workings of comparative negligence either as a matter of law or a matter of claims handling.

Another Committee attitude reflected by the Report is that some of the criticisms of the present system lack support on the basis of factual evidence. One such criticism is that it is very difficult to establish how most accidents happen and who was at fault. But the only reported research on this point seems to refute the criticism.¹² Another frequent criticism is that automobile accident litigation clogs the courts. But this criticism has often been refuted. The most recent evidence of its falsity is found in the studies made for the Department of Transportation by the Federal Judicial Center.¹³ The Committee also found that almost all of the supportable criticisms are as to matters which are correctable by making changes within the framework of the present system and which can be made on the state rather than the federal level.

For convenience the Recommendations¹⁴ may be briefly stated under six titles:

I. Proposals that aid injured persons to obtain a judgment for damages for their injuries

A. Abolition of (1) the doctrine of immunity of charitable organizations; (2) the doctrine of governmental immunity; (3) intra family immunities.

B. Abolition of the doctrine of contributory negligence and the adoption of a doctrine of comparative negligence, as in Wisconsin, accompanied by provision for contribution among joint tortfeasors and a consideration of abolishing the last clear chance rule.

The practical effect of abolishing the contributory negligence doctrine depends on the extent to which particular states have been applying the comparative negligence doctrine in the absence of a statute. In such states the effect should not be great. In states where adjusters and juries have been applying the contributory negligence rule, the effect will be to permit more claimants to recover. This does not necessarily mean a marked increase of insurance costs, because it is believed that verdicts in some cases will be moderated.

II. Proposals that assure the collectibility of judgments.

A. Universal financial responsibility, to be brought about by requiring liability insurance or other evidence of ability to pay judgments.

Some cost increase is possible as a result of the adoption of this recommendation. The extent of such an increase depends on the nature and size of the group of people newly required to insure. If the new insureds cause more than a proportionate increase in accidents the cost of insurance will go up, but careful rate making should be successful in placing most of the burden of the cost increase upon those who cause the accidents. There will be an offsetting factor in that cost of uninsured motorist coverage should be sharply reduced when compulsory insurance becomes effective. This will occur in all the states not now having compulsory insurance. An additional offset could come from bringing uninsured motorist cases under the bodily injury coverage. At present in most states, cases under the uninsured motorist coverage cost more, on the average, than cases under the bodily injury coverage—perhaps because these cases are arbitrated and because of the difficulties of handling liability cases on a first-party basis.

There will be an important side effect of universal coverage. The prospect now of obtaining a proper settlement if the defendant is uninsured and the claimant is not entitled to collect under uninsured motorist coverage is remote. After financial responsibility becomes universal, more claims will be settled.

B. Universal uninsured motorists coverage.

This coverage provides protection, for the insured against hit-and-run drivers and against being involved in an accident with a stolen car, in case the insurer of the defendant becomes insolvent. It does this by treating cars insured by insolvent companies, hit-and-run cars and stolen cars as uninsured cars. It will also cover the insured against being struck by a car illegally operated without the required liability insurance.

If financial responsibility becomes universal, the uninsured motorist coverage will cost substantially less than it does now since most of its function will be taken over by the required liability insurance. (In Massachusetts, where compulsory insurance is in effect, its cost has been \$2.00).

¹² Marryott, *Changes for Automobile Claims*, 1967 LAW FORUM 387.

¹³ See the report of this study in the Sept.-Oct. 1970 issue of the J. AM INS., at 16-17. Only 1.5% of automobile accident claims go to court, of those that do 87% are settled before trial. Only 17% of court resources are occupied by automobile cases. On the average nearly half of the delay is caused by the claimant's delay in filing suit and delay after suit is filed is strongly correlated with the increasing preoccupation of the courts with criminal cases. These conclusions are consistent with the evidence that was before the Committee. See the Report at 32-67, particularly at 32-33a.

¹⁴ There are 65 recommendations in all in the Powers Report. The recommendations are printed as an appendix immediately following this article.

III. Proposals that improve the prospect for the prompt settlement of cases. In addition to those proposals discussed in I and II above, all of which will enhance the prospect of prompt settlement of claims, the Committee made the following recommendations aimed specifically at this objective.

A. *A recommendation that the "offer of judgment" procedure be more widely adopted.*

B. *It proposed to make limits of liability insurance discoverable but not admissible in evidence.*

C. *It proposed that settlement conferences be scheduled automatically.*

D. *It proposed a study of "the quick settlement option".¹⁵*

Additionally all of the recommendations aimed at reducing delay in court will have beneficial effects in speeding up settlements, as will the further development of advance payment plans. The Committee believed that all of these proposals in combination would have the incidental effect of holding down insurance costs.

IV. Proposals that relate to the reduction of delay in court:

More judges where needed; training for advocacy; judicial education; Judicial Administration; A unified court system; The appointment of court administrators; judges selected on the basis of merit, assured of secure tenure and salary, adequate retirement pay and subject to discipline; Lawyers to be ready for trial and to do their work with greater dispatch; Better scheduling of cases for trial; encouragement of voluntary waivers of jury trial; streamlined selection of jury panels; trials by juries of less than 12; non-unanimous verdicts; automatic pre-trial settlement conference; impartial medical panels; remanding cases where appropriate; various efforts to expedite settlements; and continued search for more satisfactory plans for the voluntary arbitration of regular negligence cases and continuation of existing plans for arbitration.

Adoption of these proposals, it is believed, will contribute importantly to the reduction of delay in court. If delay is reduced, both settlements and other dispositions will be expedited. The effect on costs, though secondary in importance to the desire for speedy and efficient justice, should be favorable.

V. Proposals to eliminate the problem of the uncompensated injured person.

The adoption of the proposals that make recovery of damages more certain will result in reducing the number of uncompensated injured persons. But so long as we continue to have an automobile reparations system in which there can be cases in which no recovery is obtained from the defendant because he cannot be proved to be at fault, there will continue to be persons who are not compensated. This, as a social problem, is becoming smaller in view of the growth of benefits from other systems. Nevertheless, it seems likely that examples of uncompensated victim will continue to be used as a basis for criticism of the present system.

The Committee felt that a feasible cure might be a modified form of medical payments coverage,¹⁶ and proposed that this be studied further. There was some confidence in the idea that paying these modest benefits without regard to fault, but within the form and framework of the fault system and on a basis that credits them on any settlement or judgment, would not weaken but rather strengthen and make more certain the preservation of the values of our present system.

¹⁵ In brief, the "quick settlement option" (stated at p. 100 of the Report) would, as respects bodily injury cases in which the cost of medical and hospital services (excluding X-rays) does not exceed \$250, give insurers an option, exercisable within four months of the date of accident, to limit their liability to the medical and hospital bills for services rendered within four months of the accidents, plus (1) twice the amount of such bills (excluding for this multiplication X-ray bills), plus (2) 70 per cent of the value of the time lost subject to a maximum weekly payment of \$100; and (3) the reasonable cost of the damage to the claimant's property, not including loss of use.

The plan would not apply if (1) the total of the amounts described, other than property damage, exceeds \$1,000, (2) there is dismemberment or amputation, (3) there is permanent impairment of or limitation in the use of any part of the body, disfigurement of the face, neck, head, forearms or hands. There are provisions for judicial review.

¹⁶ This is described at 97-99 of the Report. In brief, "The Committee suggested for study a new form of medical payments coverage that would be on a crossover basis. This would be a mandatory part of the policy. As respects one car collisions, it would pay the driver and the occupants of that car. In multi-car collision cases, the driver and occupants of car A would be paid by the coverage on cars B and C; the driver and occupants of car B would be paid by the coverage on A and C. A and C would contribute, etc. Payments made under this coverage would be credited upon any settlement or judgment obtained by the one who received the payment. This concept, if made effective, would result in a modest system of benefits based on strict liability, but on a third-party basis within the form and framework of the tort system. The benefits would not duplicate benefits due as part of a tort recovery, as they do in many cases today, but would constitute a prompt part payment on a periodic basis of whatever settlement might ultimately be arrived at."

VI. Proposals relating to highway safety and the deterrence of negligent conduct.

The Committee believed that effective deterrence of negligence conduct can be achieved by a combination of civil and criminal sanctions, including a continuation of the fault principle, by education and law enforcement and by the wise use of insurance rating practices that impose financial detriments on dangerous drivers or grant awards to those who conduct themselves so as to avoid accidents, and urged lawyers to aid and support the cause of highway safety.

CONCLUSION

The stated objective of the Committee was evolutionary improvement of the present system. The report reflects an awareness that the tort law itself has long been evolving in the direction of greater protection for the individual who has been injured. It positions itself with those who believe that satisfactory progress in protecting society against the dangers of the automobile age can be made more surely, and perhaps more rapidly, by working to secure moderate changes and improvements of the sort recommended by the Committee than by advocacy of more drastic plans.

Some times the Bar seems more effective in opposition to change than it is in its advocacy of change. While such talents will likely be needed in dealing with some of the proposals that may be presented during the forthcoming legislative sessions, it would be unfortunate if the Report served only defensive purposes. It is hoped that the action by the American Bar Association in adopting the Recommendations of the Special Committee will serve to unify the thinking of lawyers who are concerned with this subject, will help to modify and make less diverse the ideas previously held by various other lawyers' associations and will sufficiently encourage affirmative action to secure the widespread adoption of these progressive proposals.

Some of the proposals for drastic change are vulnerable upon critical analysis and may not sufficiently reflect public desires as to make this enactment likely. However, it does seem that evolutionary changes of the sort recommended by the Committee) to incorporate more fully within the present system reasonably based public expectations as to the protection to be given to automobile accident victims, ought to be made. Such changes, which are of benefit to the general public and the long range interests of all lawyers, especially those who have a substantial practice associated with the automobile accident reparations system, will be better served by an attitude of receptivity toward reasonable revisions than by "successful" defense of the status quo.

APPENDIX

AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS

Approved by the House of Delegates of the American Bar Association in August, 1969.

Recommendations

Whereas, on January 27, 1969, the Special Committee on Automobile Accident Reparations presented to the House of Delegates its report, which is described as No. 13 on the printed book of Committee and Section Reports; and

Whereas, said Committee's report recommended the adoption of four resolutions numbered I, II, III, and IV; and

Whereas, Resolution II was, at the time of presentation, amended in part; and

Whereas, all four resolutions, as amended, were adopted and approved in the following language, to-wit:

I. The Special Committee on Automobile Accident Reparations be continued for the purpose of studying, evaluating, and reporting from time to time, on further proposals for changes in the system of providing reparations for those injured in automobile accidents.

II. The present system for providing reparations for those injured in automobile accidents, based upon the concept that if there is no fault there is no liability and relying upon an adversary method of trial before a court or jury as the means of determining liability and the amount of damages, be retained as the basic legal structure for dealing with such cases but that the following proposals for further study, changes in, additions to, and modifications

of such system should be further considered and a final report be submitted in time for distribution to the House 30 days before the Annual Meeting in Dallas. (Following the above language, Recommendations A and I with subsections, which were the subject of further study, were set forth.)

III. Proposals that would severely reduce benefits payable to persons injured in automobile accidents or would abolish or substantially abolish the tort basis of the automobile accident reparations system, such as The Keeton-O'Connell Basic Protection Plan and the "Complete Automobile Protection Plan" announced by the American Insurance Association, be opposed.

IV. Persons designated by the President of the American Bar Association be authorized to support the adoption of legislation consistent with these resolutions, and to oppose legislation inconsistent with these resolutions, before appropriate legislative bodies and other groups, and

Whereas, the Committee has further studied the subjects assigned to it and has submitted its revised report to the members of the House of delegates of the American Bar Association thirty days before the 1969 annual meeting in Dallas, Texas, all as required by Resolution II;

Now, therefore, be it resolved, that the following further recommendations be adopted.

A. Recommendations regarding delay in the courts

We recommend:

1. The adoption and implementation of a plan, by constitutional amendment if necessary, for a unified court system with power in one of the judges to assign other judges to judicial service so as to relieve court congestion and generally to utilize the available judges to best advantage.

2. That adequate judicial statistics be maintained.

3. That in jurisdictions having many courts, or in which a need has arisen from other causes, court administrators be appointed, responsible to the chief judge or to the administrative judge, for the performance of the administrative work of the courts.

4. That court administrators attempt to device, or assist the court to device, ways of scheduling cases for trial so as to maintain the maximum feasible degree, an uninterrupted flow of cases.

5. Further efforts to assure that judges be selected on the basis of merit, including the adoption by state and local bar associations of by-law provisions defining the procedures for the participation of the association in the process of judicial selection.

6. The adoption of a plan or rule under which judges, as long as they perform their duties in a satisfactory manner, are assured of adequate pay, secure tenure in office until a stated retirement age, and retirement then under an adequate retirement plan.

7. The adoption of a plan or rule under which the lazy, incompetent, aged, ill or otherwise infirm judge can be retired or, if necessary, removed from the bench, under which judicial misconduct can be subjected to discipline, but which contains safeguards for the protection of the judge and those who complain about him.

8. That voluntary waivers of jury trials be encouraged and that plans such as the Los Angeles Plan, under which panels of judges who attract jury waived cases are utilized, be experimented with in other jurisdictions.

9. That measures be taken to streamline the selection of jury panels and to shorten the voir dire without loss of its value.

10. That in automobile accident cases a pretrial settlement conference be scheduled in every case, unless a party objects, and that a full scale pretrial occur in those cases in which the court or either party so requests.

11. That, as respects automobile accident cases, in jurisdictions which now permit the use of juries of less than 12, such smaller size (not less than 6 persons) juries should be used. Where such juries are not now permitted, provision should be made for their use.

12. That, as respects automobile accident cases, when a 12 person jury is employed, a nonunanimous verdict (but in which at least 9 concur) should be permitted.

13. That in appropriate cases video tape be utilized to present the testimony of medical witnesses.

14. That impartial medical panels be established in jurisdictions where they do not now exist and that such panels be used frequently.

15. That judges be given statutory power, and that it be freely exercised, to order appropriate cases transferred to the lower court in which, considering the amount involved, the case should have been commenced. When these transfers occur the jurisdictional limit of the lower court should be increased automatically to cover whatever verdict is rendered in the case.

16. Continued efforts to dispose of automobile accident claims by prompt settlement and continued efforts to make periodic payments to or for claimants pending settlement agreement or judgment. In aid of such efforts, and for other reasons, a change to the comparative negligence doctrine (which may have the effect of making total victory for either side less likely) is recommended. Removing doubts about the presence of liability insurance and as to the available limits of liability, by providing for mandatory liability insurance and by making the limits of liability discoverable also is recommended. In further aid of such efforts, devices such as Section 997 of the California Code of Civil Procedure should be tried more widely to the end that defendants are encouraged to make prompt and realistic settlement offers and plaintiffs are encouraged to accept them. Where needed, legislation to permit prompt disposition of some claims arising out of an accident without prejudice to the defense of other claims and to permit advance payments without fear that they will be construed as an admission of liability should be enacted.

17. That the right of trial by jury should not be abolished as respects negligence cases arising from automobile accidents, nor should its use be interfered with seriously by procedural obstacles or by the imposition of unreasonably high costs upon the litigants.

18. The continued use of voluntary arbitration as a means of resolving disputes within the scope of the Nationwide Inter-Company Agreement or within the scope of the Special Arbitration Agreement and in the disposition of claims under uninsured motorist coverages.

19. The continuation of efforts to bring about a fair and workable plan for the voluntary arbitration of appropriate categories of small tort claims arising from automobile accidents, but the emphasis should be on efforts to improve the stature of the courts and their ability to do their work on time, on assuring litigants easy access to the courts for the resolution of their controversies by professional judges, and on seeing to it that the right of trial by jury is preserved, in fact and in theory.

20. That programs of judicial education be intensified and expanded and that judges, particularly new judges, should be enabled to participate in the programs at public expense.

21. That greater emphasis be placed on training lawyers for advocacy, both in the law schools and in continuing legal education.

22. That judges should adhere to work schedules developed by the administrative judge to the end that judicial work loads are consistent with generally acceptable standards, and that in jurisdictions where the pace of judicial performance is recognizably slow the local bar associations should, if necessary, initiate speed up programs.

23. That lawyers should not contribute to the problem of delay by being dilatory in their work, or by failing to be ready to proceed with the case when it is reached for trial.

24. That in places where excessive and unjustifiable delay in the courts now exists, the number of trial judges should be increased, and whenever the need is clear, appropriate increases in supporting personnel and physical facilities should be provided. The recommended method of assuring that the number of judges shall be adequate to meet the expanding need is a constitutional or statutory provision which creates a new judicial office and requires it to be filled upon each significant change in the ratio between the population and the number of judges.

B. Recommendations as to substantive law

We recommend, as Respects Automobile Accident Cases :

1. That the states adopt a Wisconsin type of comparative negligence system supported by a special verdict procedure.

2. That the states which adopt the Wisconsin comparative negligence system make statutory provision for contribution among joint tort feorsors proportionate to the percentage of causal negligence attributable to each.

3. That the states in which the doctrine of contributory negligence is abolished should consider the abolition of the last clear chance rule.

4. That the doctrine of governmental immunity, as respects states and municipalities and their departments, commissions, boards, institutions, arms or agencies, be abrogated so as to make such defendants liable for injuries and damages negligently inflicted through their operation, maintenance or use of automobiles.

5. That the doctrine of the immunity of charitable organizations be abrogated.

6. That the doctrine of the immunity of a spouse to the tort claim of the other spouse be abolished.

7. That the doctrine of the immunity of a parent to the tort claim of his child and of the immunity of a child to the tort claim of his parent be abolished.

C. Recommendations as to the law of damages in automobile accident cases

We recommend :

1. That the general rules, including the collateral source rule, for the ascertainment of damages on an individualized basis be retained;

2. That additurs or remittiturs be used in those instances in which the damages awarded are excessive or inadequate;

3. That the jury be instructed of the fact that compensatory damages on account of torts or tort type rights are not subject to income tax;

4. That statutory limitations upon damages in death cases, in those states in which the recovery is measured by pecuniary loss, be removed.

D. Recommendations as to certain categories of persons who are injured in automobile accidents

We recommend :

1. *The uncompensated claimant.*—We recommend that a plan, termed "The Crossover Medical Plan" (under which every victim of an automobile accident, except perhaps those flagrantly at fault, who incurs medical expense as a result of an automobile accident would be paid an amount equal to that expense up to a stated amount), be studied by interested persons and particularly by the insurance industry, and that the objective results of the studies, including reasonably precise cost data and any alternative proposal for dealing with the problem of the uncompensated injured person on a third-party basis, be made available to the bar, to legislatures and to the public.

2. *The overcompensated claimant.*—We recommend that a plan, termed "The Quick Settlement Option" (under which an insurance company is given an option, if it is promptly availed of, to settle described categories of automobile accident cases for values determined by a formula), be studied by interested persons, and particularly by the insurance industry, and that the objective results of the studies, including reasonably precise cost data, and any alternative proposal for dealing with the problem of the overcompensated injured person be made available to the bar, to legislatures and to the public.

3. *The seriously injured, undercompensated claimant.*—We recommend several things, which are aimed more specifically at other problems, each of which are believed to contribute something toward the easing of this problem, namely: compulsory insurance, mandatory uninsured motorist coverage, increased limits of liability, removal of certain statutory limitations, replacing the contributory negligence doctrine with a comparative negligence doctrine, assurance of at least part payment of medical expense, retention of collateral source benefits, relief of time pressure to settle by reducing delay in the courts.

E. Recommendations as to costs

We recommend :

1. *Automobile insurance costs.*—Further and persistent effort to find better and less costly ways of providing and distributing the automobile insurance product and of performing all other automobile insurance services with optimum speed and economy.

2. *Costs of legal services in automobile accident cases.*—

The Contingent Fee

a. The contingent fee system is a valuable method of making legal services available to a person who has a legitimate claim but insufficient means to pay or retain an attorney, and its use should continue.

b. Courts, upon whom the duty of supervising the legal profession rests, should assume where necessary or advisable, exclusive responsibility (1) in the examination, scheduling and supervision of contingent fees, and (2) in the disciplining of attorneys who have violated the rules or have acted unprofessionally.

c. Courts should consider the need and expediency of requiring lawyers to file information on contingent fees. Requirements should be promulgated in the light of local conditions. Among the requirements that should be considered are the filing of information on all contingent fee contracts and arrangements (oral or written) with the courts and the filing of closing statements in all cases.

d. Courts should, where appropriate, promulgate a contingent fee schedule, considering such factors as whether the case is settled before, during or after the trial; whether a case is appealed; the probable amount of time and effort expended by the lawyer; the complexity of the case; the ingenuity exercised; the risk involved; and what, in the over-all view, should constitute a fair and reasonable fee for services performed.

e. Courts should provide (1) appropriate means and methods for clients to file complaints and (2) procedures for the consideration and determination of such complaints.

f. If a lawyer pays or a forwarding lawyer is paid a referral fee, the amount should be fair and reasonable and have direct relationship to the value of the services performed. Any such payment should be subject to the review of and determination of the court.

F. Recommendations as to automobile insurance

We recommend :

1. That states that have not done so adopt compulsory automobile insurance laws (allowing alternative methods of assuring that the defendant will be financially able to respond in damages, such as the advance posting of a bond, cash or securities) applicable to both bodily injury and property damage liability and that the required limits of liability be not less than \$10,000 for bodily injury sustained by one person as the result of one occurrence, \$20,000 for all such damages sustained by two or more persons as a result of one occurrence, and \$5,000 for property damage resulting from one occurrence.

2. That such compulsory insurance laws require that every policy issued contain uninsured motorist coverage, which includes insolvency protection.

3. Continued efforts to persuade insurance buyers that higher limits of liability than those required by law are advisable for their own protection and for the protection of injured persons.

4. That states now requiring limits of liability less than 10/20/5 change their statutes to require at least those amounts.

G. Recommendations as to the use of the tort law to deter dangerous driving

We recommend :

1. That efforts to utilize the tort law and the insurance rating system, as well as the criminal law, to strengthen deterrence of dangerous driving be continued, and that studies be encouraged to seek further enlightenment as to how such effects can be most effectively and acceptably strengthened.

H. Recommendations as to the Cotter plan

We recommend support for the following proposals included in the Cotter Plan :

1. That the doctrine of comparative negligence be adopted along with a special verdict procedure and that provision be made for contribution among joint tort feors.

2. That advance payments and prompt settlement of property damage claims be promoted by making clear that the payments do not constitute admissions of liability.

3. That stiff penalties be imposed for fraud and that the claimant should be required to cooperate in the furnishing of information and in submitting to physicial examinations, our support for this proposal is conditioned upon reasonable safeguards for the claimant and his attorney being provided.

4. Support, in principle, for the concept that provision be made to recognize the tax free nature of damage awards.

We recommend opposition to the following proposals included in the Cotter Plan :

1. Mandatory arbitration of tort claims in the form proposed and under the circumstances which exist in Connecticut.

2. The mandatory inclusion in private passenger automobile liability policies of "no fault benefits" on an accident and health insurance (first party) basis.

3. That awards for pain, suffering and inconvenience be limited (with some exceptions) :

a. in cases in which the medical and hospital expense is not over \$500, to 50% of such expense

- b. in cases in which the medical and hospital expense is in excess of \$500, to 50% of the first \$500 plus 100% of the "medical" in excess of \$500
4. To limit contingent fees in the manner specified in the "Cotter Plan," viz. in any event no more than 25% of the amount of the recovery unless application for greater compensation is made to the court, and authorizing any court in the state to adopt rules prescribing graduated maximum contingent fee schedules but not exceeding the 25% limitation.

I. Recommendations as to highway safety

We recommend:

1. That lawyers study and support all wisely conceived programs aimed at the prevention of highway accidents and injuries.
- J. That the special committee on automobile accident reparations be continued*
- K. That persons designated by the president of the American Bar Association be authorized to support the adoption of legislation consistent with these resolutions and to oppose appropriate legislation inconsistent with these resolutions before appropriate legislative bodies and other groups . . .*

ACTION OF HOUSE OF DELEGATES, AUGUST 1969

REPORTS OF SPECIAL AND STANDING COMMITTEES

Automobile Accident Reparations (Report No. 18)

In lieu of the resolutions proposed by the Committee, the recommendation of the Board of Governors was adopted. The Board recommended that the House approve generally the recommendations of the report grouped under the headings A through J, notwithstanding that there was basis for disagreement with respect to certain of these fifty-three specific recommendations.

The Committee's resolution K was approved as follows with amendment recommended by the Board of Governors (added material underlined):

K. That persons designated by the President of the American Bar Association be authorized to support the adoption of legislation consistent with these resolutions and to oppose appropriate legislation inconsistent with these resolutions before appropriate legislative bodies and other groups *with appropriate recognition, however, of points of disagreement with respect to certain of the specific recommendations.*

MR. KUHN. I would like to call on Judge Reardon now.

Judge REARDON. Mr. Chairman. I want to say at the outset I, too, am very honored to make this appearance before you today and I am grateful to you for it. I cannot help but think that perhaps what I say will not constitute any real contribution to your inquiry and your work. It will, however, have this effect: I am sure that it will cause me to give much greater consideration to witnesses who appear in my courtroom hereafter.

In 1968, the special committee on automobile accident reparations of the American Bar Association began its study and evaluation of the existing system of providing reparations for those injured and damaged in automobile accidents. This system is one based upon the concept that if there is no fault, there is no liability, and relied upon an adversary method of trial before a judge or jury and judge as a means of determining liability and the amount of damages.

After extensive inquiry, research and public hearings the committee determined that the fault concept should be retained as a part of the legal structure for dealing with these cases, but that numerous modifications should be considered. Mr. Kuhn has covered these recommendations and I will not repeat them. They are in the material that has been admitted.

About 2 weeks ago, the American Bar Association appointed a new special committee to work in this area. Its purpose is to assist in pre-

senting the association's views on this subject; and to cooperate with interested sections and committees of the American Bar Association and with State and local bar associations to bring about enactment of legislation to improve automobile accident reparations procedures.

The American Bar Association is the major voice of lawyers in the United States. Despite evidence that may have been previously given, the American Bar Association does not have a closed mind to the frailties and defects of the existing system. At the time of the report of the American Bar Association Committee on Automobile Accident Reparations, the extensive research that has been provided by Congress to this committee was not available. The change that is being suggested by the pending legislation is a drastic one, and reasonable men, whether they be legislators or lawyers—or both—will approach the plan with caution. It is unquestionably true that backlogs do exist, particularly in metropolitan areas. It is also true that in some metropolitan areas—for example, Miami, Fla., and in less urban areas of the country—there are no appreciable backlogs. There are hundreds of trial courts around the country which are as current as they should be. In these areas, efforts that were previously made to speed up procedures are being slowed down, because there is such a thing as a trial court being too current—determination of injury permanency cannot be made and counsel have had insufficient time to prepare. A typical example of this situation may be found in the State of Illinois where an enormous backlog exists in the metropolitan area of Chicago, but in the area of downstate Illinois, where approximately one-half of the 10 million people of that State reside, there are no worrisome backlogs in the trial courts.

Trial judges throughout the United States vary in their judgment as to the percentage of judge time that is required to handle tort cases. I have an uneasy feeling about the statistics in this area. They vary so greatly they seem to lose credibility. Some judges feel that as much as one-third to one-half of their judge time is used in handling tort cases. Other judges disagree. Studies were made in the Superior Court in Boston, which indicate that automobile accident cases did not represent as substantial a part of the trial calendar as was believed. In my own case, and in my own court, we estimate that 50 percent of judge time is used in the handling of criminal cases. Domestic relations and automobile accident cases share secondary importance. Trial judges cannot help but wonder as to the preoccupation that seems to be attached to auto accident cases, since the same concern does not seem to exist for other tort cases and for criminal cases. It would seem to me that, if we are going to enter into a program that will make whole the victims of automobile accidents, then logically we might well consider a more comprehensive plan involving the health, medical expense, and loss of employment of all accident victims. Individually, many of us who oppose such a broad concept wonder as to the validity of preferring the victim of the automobile accident.

As an individual, I cannot bring myself to the point of saying that I oppose no-fault plans. We already have no-fault in our system; collision insurance and medical pay are examples. If no-fault plans will work and if the cause of justice is served, then certainly judges throughout the United States will support them. I would like to emphasize that the American Bar Association has an open but troubled

and critical mind on this issue. The appointment of this committee is an evidence of its concern. The American Bar Association has in the past, and I am sure will in the future, respect its solemn obligation to the advancement of the public interest. It is in the great American legal tradition to support even unpopular causes if they contribute to the public welfare. Surely reason and prudence direct us to proceed cautiously. Let us learn the results in Massachusetts. Let us withhold judgment until after sufficient time has elapsed and ample experience has been gained for reasonable people to formulate considered judgment.

I certainly am no expert in the field of no-fault as distinguished from fault concepts, but I am convinced it is foolish to believe greater benefits can be provided at a lesser cost. I also am concerned about the distinction that is made in most plans between the small and the large case. This would seem to me to require two types of protection—one, a first-party type to cover the small claim, and second, the policy to cover possible losses suffered within the tort system. It seems doubtful that this would be less expensive.

I would be the last to suggest that traditional methods of operating courts have not contributed to court delays. There are many of us who have, for years, urged and worked desperately to modernize and speed up judicial procedures to the end that we can cope with the ever-increasing volume of work. It seems to me that the suggested proposal is one that will provide lesser benefits at a lesser cost. Again, I say, I do not disagree with this concept, but I do disagree with those who would sell this proposal to the people on the theory that they are going to get something for nothing. I also find it difficult to agree with the idea that the fault concept is not relevant to damages or injuries arising out of an automobile accident. It is my impression that juries do act as the community conscience and are able to reach reasonable judgments in this regard, and it seems to me that even the proponents of the no-fault system must agree with that because they recommend the retention of the jury trial system for the more serious types of automobile tort cases. The same can be said of the proponents again with respect to pain and suffering. They would eliminate it from the small case as an element of damage, but they would retain it for the more serious case. Somehow or another this logic escapes me. Although I was a member of the American Bar Association Committee on Automobile Accident Reparations, I do not agree with their failure to recommend the Philadelphia arbitration plan.

This plan, in my judgment, will reduce delay in the disposition of claims and will relieve the court of congestion. My inquiry causes me to believe that the plan works extremely well and that few cases are appealed for trial *de novo*, and of those appealed most are settled without trial. Certainly, we can urge the adoption of the comparative-negligence doctrine of Wisconsin and eliminate the doctrine of last clear chance and assumption of risk. As was recommended by the American Bar Automobile Accident Reparations Committee, we should do away with charitable, governmental, and intrafamily immunities where they exist. We should have mandatory liability insurance with realistic limits.

I personally feel that we should require increased first-party medical payment coverage. A \$2,000 amount to encompass loss of wages to be

deducted from any future award would have a chilling effect on subsequent legal action. We certainly cannot continue the unfortunate automobile guest statutes, which came into being as an overreaction to instances of collusion. We should insist that uninsured motorist coverage be included in our policies.

Most important of all, we should realize that, in a sense, we are dealing only with the symptoms of the problem that besets us. The language of Justice Blackmun in a recent concurring opinion in the Supreme Court of the United States—*Tate v. Short*—highlights this thought. He was speaking of using jail sentence as punishment for traffic offenses. He said:

Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions and leaves only possible Eighth Amendment considerations. If, as a nation, we ever reach that happy point where we are willing to set our personal convenience to one side and we are really serious about resolving the problems of traffic irresponsibility and the frightful carnage it spews upon our highways, a development of that kind may not be at all undesirable.

Our sincerity should motivate us to tighten up on the issuance and renewal of driver licenses and make examinations for drivers' licenses meaningful. Should we consider implied-consent laws on a national level? Should we insist upon State implementation of the requirement of the National Highway Safety Act? Our actions here may test and grade our sincerity to the cause of safety on our highways and may relieve us of some of our concerns in the field of reparations.

Mr. KUHN. I would like to call on Mr. Davidson of Chicago.

Mr. DAVIDSON. Mr. Chairman and members of the committee, I certainly thank you for the privilege of speaking to this subject and, with due respect for the time of the committee, I will do my level best not to cover any of the material that has already been covered by Mr. Kuhn and Judge Reardon, which I completely endorse as far as the views they have expressed.

The association has approached this problem, Mr. Chairman, with a recognition of the many ills that there are in the present system. I made a list of them and some have been covered in the statements that have been made; we know that changes must take place. But, we didn't know at the time of the Powers committee study that we would be running into a national statute, and are concerned about this step being taken at this time because once you cast out the old system in its entirety it may be irretrievable, and it conceivably might be a very grievous error or mistake, because you will affect the whole population of this country if this change is made.

We feel that the advantages that derive from letting it be tested out in a State-by-State approach, even though there are drawbacks in the State-by-State approach which are obvious to all who think about it, that we will all benefit. We can learn by these pilot programs, by their mistakes, and then if it seems appropriate to go to a national system, it will be time enough then to take such action.

The work of this very committee, if I may suggest that to you, Mr. Chairman, and the DOT study, has given impetus all over the United States to the various State legislatures, and the last count I heard, and here as Judge Reardon said, I don't know how accurate they are, that 27 States are now considering legislation of this kind.

We have it in Illinois where the Governor has introduced a bill and the lawyers there, both the plaintiff and defense bar, are trying co-operatively to work out some sort of program covering the primary loss up to the \$2,000 level, and then the medical and hospital, and a certain amount for wage loss and certain areas of difference there, and we are advised and I, of course, obviously cannot be certain of this, but there is a high possibility that Illinois may have such a law before the legislature adjourns this session. No one knows because there will be differences of views when the problem is argued out down in Springfield.

I think that a change of this magnitude is so disruptive to the industry and to the public and to the profession, and it should be approached with caution and it may, though, prove to be a splendid thing. Part of the suggestion that has been made is that it will eliminate some of the cost in the system of litigation. I think it must be recognized that part of the expense of the attorney's fees on the plaintiff's side is really paid for by the industry, in a sense, rather than the litigant.

The studies that have been made have shown that the client represented by an attorney proportionately recovers so much more that he ends up better off than the person who has no attorney, even after he pays the fee. It is true it is a burden on the system and I recognize it.

I think, as in any field of endeavor, the workman is worthy of his hire. Any thought that by going to "no-fault" we will eliminate problems in litigation is wishful thinking. You just can't do it. You can't cut areas for controversy out of any system devised by humankind. We went through a list very quickly of some of the areas of litigation experienced in other fields over 30 or 40 years that tells us provisions in this bill are bound to cause areas of dispute in the courts.

I won't touch on the question of the inadequacy of compensation really to all, as we view the system, but you have here an effort, as they say, to eliminate the negligence point and you will find because of the definition of catastrophic loss it will apply to only 5 percent of all people harmed and the DOT study shows the level of expenditures involved and nature and extent of the disabilities, so that 95 percent of the public will be in the lower category and not entitled to any recovery for pain and suffering or any recovery for disability.

To reach this level of 70-percent disability, Mr. Chairman, that has been spoken of, it is wishful thinking. If you think of a Congressman, a lawyer, doctor, accountant, actuary or architect, it is almost impossible to reach that level of partial disability for a person who functions in that sphere in society. It is true some laborers conceivably can make that, but some analogy has been drawn to workmen's compensation. I will tell you why it is not helpful.

Usually, in that field, they are talking about loss of use of a part of an arm, or a hand or a foot, but here you are talking about loss of a human being, and 70 percent of the total human being, and I don't know how anybody can arrive at this in any fair and sensible way. You eventually will find these cases are going to be litigated and we will have such a flood of litigation in the courts, as far as anybody that seeks to establish it, so it is one of the areas of controversy.

No one knows what will happen to premium costs and you have, as I say, these disputes arising in all of the different areas and I will

run through them for you quickly. Here you have a question of, "Is a man entitled to a sum up to \$36,000 for medical and hospital bills for 'necessary' care, for rehabilitation and time lost," and you run into problems of this kind, as past experience demonstrates, where there is a dispute.

If you are going to reward the man to that extent even though hurt due to his own fault, you are going to have argument also to whether he should stay off work to the extent he claims and should he have rehabilitation and does he need surgery; and, if he elects surgery, was it required by the injury and does he need psychiatric help to be rehabilitated, so these areas will lead to litigation, as has happened in other fields, and I know the last thing this committee wants to do is develop work for lawyers, but you are trying to, in some way, cut it out of the system.

Was there a wrongful refusal by carriers to pay, and they, I think, are being penalized, being charged 2 percent a month if they don't pay the bills submitted to them. Suppose these bills are unfair, suppose they are grossly exaggerated and unjustified. The carrier, at great peril, has to start paying or at great peril can refuse. If the refusal is wrongful, it will cost the carrier 24 percent a year plus attorney's fees. They are being coerced and cannot sit back and discuss it and take time to fairly resolve the questions involved. Is this a fair thing to do? Should this man be back at work? This is imposing an additional unjustified burden on the system.

I think that the things that have been covered here very quickly tend to indicate, I would hope, that there are reasons for approaching this with caution and finding out how, in practical experience, they do work out, and I realize, as the previous speaker from the AFL-CIO indicated, that the States do have to be pushed and I know that what you are doing here is pushing them very, very definitely, because a lot of them feel it is maybe a lesser evil to get a State system going.

I know there are questions that have been presented to your committee as to the constitutionality of this law, and am sure you have thought about due process and equal protection, and the question of just compensation to the victim and the right to a jury trial under State law. I will not pretend to be a learned Constitution lawyer but I say to you I think there are great questions as to whether an act of Congress can set aside these State statutes and, if they do, there are going to be problems in these States.

Mr. Moss. I would just observe the Chair knows of no instance, no area in the Nation where the impact upon interstate commerce is more clearly established as a basis for congressional action, or, if it should desire, total preemption, than in the issue now before the committee.

But I think the Chair, also, in response to the implication that the committee might not be fully alert to the very serious and far-reaching consequences of the legislation before it, I can reassure you that it is fully aware of all of the ramifications which attach to this subject and I believe it is proceeding with care, with deliberateness, in a most responsible and thorough manner.

You mentioned the happenings in Illinois. It might interest you to know that tomorrow the Illinois Department of Insurance will be

represented here before this committee as have the insurance commissioners from other States, and we have attempted, and we will continue to attempt, to afford an opportunity for the fullest hearing and consideration of the views of any group interested in coming before this committee. We don't want to act in a vacuum at any time. We are most anxious to have as full a hearing record, as broad a spectrum of opinion, from interested and competent persons as it is humanly possible to develop.

We are in the process of establishing that kind of record as the basis upon which the committee, in its deliberations and markup, can act.

Just as a matter of reassurance, we are very much aware of the responsibilities imposed upon us by this issue.

Mr. DAVIDSON. Mr. Chairman, I thank you for the comment and I certainly would not imply that this committee is doing other than what you outlined because this has been the information flowing back to us, of the care and caution and thoroughness with which this committee has proceeded and I thank you for the opportunity.

Mr. MOSS. Mr. DEACY.

Mr. DEACY. I, too, am honored to be here, to be included with these three distinguished lawyers and bar leaders and also to represent the American College of Trial Lawyers.

The college is a select group, and election to the college is honorary. The college consists of about 2,300 lawyers and its membership is limited to no more than 1 percent of the lawyers in any State, and in most States falls substantially under that. The college is interested in all matters having to do with the administration of justice and the college rightly concerns itself in this issue.

Now, the college consists of advocates and trial lawyers representing all sorts of people in all kinds of litigation. The college committee, special committee on automobile accident reparations, was appointed, and studied and made its report to the board of regents of the college on March 11, 1971. The college report was approved. Now, I understand that yesterday Mr. Kronzer of Texas spoke. He is a fellow in our college and I understand he testified yesterday and introduced the report of the committee in the record.

Mr. MOSS. That has been accepted for the committee files.

Mr. DEACY. Very well, I need not duplicate that. I will, however, state that, of course, the college committee had the benefit of the vast study done by the American Bar Association committee, and by the Department of Transportation and by the Governor's Automobile Accident Study Commission of California before it.

I don't know whether the California Governor's Study Commission has been introduced and made a part of the record and, if not, I offer it; this is volume No. 1, Executive Summary of Recommendations and Conclusions of the Governor's Automobile Accident Study Commission of California, December 19, 1970, which summarizes a very comprehensive review of this problem by a commission composed of legislators and other people in the State of California.

Mr. MOSS. Is there objection to including the California study in the hearing record following the testimony of the witness?

Hearing none, that will be the order. (See p. 999.)

Mr. DAVIDSON. I will say this, Mr. Chairman. This is volume 1 and there are five volumes and the others are quite big.

Mr. Moss. I have them.

Mr. DAVIDSON. You have them?

Mr. Moss. Yes.

Mr. DAVIDSON. Then this one is sufficient. Thank you, Mr. Chairman.

Now, turning to the report of the Committee of the American College of Trial Lawyers. After studying the issues presented in the various plans, radical reform automobile accident reparations, the committee recommended, their basic recommendation was as to the automobile plans that have come forward including at that time Senator Hart's bills, that the committee is not sufficiently persuaded of the merits of any current proposals to recommend adoption of any of them, as a corollary to the committee was firmly against intrusion of Federal law into the area.

Evaluation of auto plans involve assumptions about cost, claims consciousness, fraud, deterrent, settlement behavior, lawyer behavior, assumptions on which experience with actual operation will shed much light; moreover, the change from the common law to a plan is likely to be an irreversible change and it will be difficult to retrace our step if experience proves the change unwise.

It was the opinion and recommendation of the committee that it would be imprudent therefore with things in this posture to ever change the tort law in one single giant step.

Now, we noted that most of the criticism of the operation of the existing system centered around the small claim, the expense of the small claim, overpayment of the small claim because of the nuisance factor, and we also noted that the small claim constituted a very high percentage of claims that are being administered under the system.

It appeared to us that if we can find a strategy for dealing with the small claim, and in a sense solve the problems relating to it and get it out of the system, this would be a most constructive proposal.

Accordingly, we recommend that the State require that, with each auto insurance policy issued, there will be a mandatory offering of first-party coverage for the insured, members of his household and passengers in the insured vehicle, for medical payment and economic loss in the amount of \$1,500 to be rejected by the insured only on his written direction.

Now, in the report we state why we feel that this would tend to take a high percentage of the small claims out of the system, therefore take out of the system the overpayment because of nuisance value, the cost of handling such claims, attorney's fees in connection with them, and I might say that the total attorney's fees incurred in the system, a very high percentage, has to do with the handling of these small claims.

We would make it, or we would recommend that the State law provide, and this coverage that we suggest here, that any payment made to a first-party passenger in a car be subject to a lien in favor of the insurance company that makes the payment, so that if that party then seeks redress against a guilty third party and recovers, then the insurance company has a right to recover the amount that has been paid.

We feel that this would deter the making of these small claims, because a person who has been paid his economic loss and medical ex-

pense, if he recovers that from a third party, then he would have to pay it back to the insurance company and we feel that this would not only deter other claimants but deter attorneys seeking to prosecute these claims.

We feel that taking a substantial percentage of the small claims out of the system would reduce greatly court congestion to the extent that the automobile case contributes to it.

We feel this is a strategy which can easily be employed and can be followed and, if it does not work, then something else can be done. But it can be done without basic change in the structure of our tort system and the right of people to resort to the courts.

One other significant thing that appeared apparent to us, we recognize that possibly two-thirds of the expense in the automobile insurance system goes to the repair of damage to automobiles themselves. So, when you are dealing only with the bodily injury aspect of the automobile insurance problem you are dealing with only one-third of the cost and of course the bodily injury is more significant than the other factor, but from the cost and expense factor we were impressed that it is the enormous and staggering and high cost of repairing automobiles that is the greatest expense factor in providing and paying out insurance premiums.

We note that the Department of Transportation, Secretary of Transportation, operating through the agencies, are very much concerned with the production of automobiles that will withstand tremendous extensive and expensive damage at very low speed collisions. I don't know, you know them, you have heard them, a 1970 car, even more so, a 1971, at 5 miles an hour if you run the front of it into a barrier, it costs \$500, \$600 or \$700 or \$800 to fix it up and much more at greater but not high speeds also of 10 or 15 miles an hour, and it is worse.

We highly endorse the programs for the change in design and manufacture of automobiles to reduce their susceptibility to such high damages of these cars have on small-velocity collisions, and we feel that this more than anything else can help reduce the cost of the insurance system.

Finally, I would say only one more thing. Among the criticisms of the present system is the honesty aspect of it, fraudulent claims, and the like, perjury in the courts. I don't see how any of the plans, including this proposed plan, are going to affect that. Indeed, I would say, to emphasize what Mr. Davidson said, that in this proposal, if an insurance company fails to pay on the presentation of a bill or a claim, in an earlier version of the bill I might say I think it was required that the claim be fraudulent or so excessive as to not be based upon any, well, I forget the standard, but in this H.R. 7514 version there is no such limitation.

If the insurance company fails to pay, it incurs interest at the rate of 2 percent per month, or 24 percent a year, and, in addition, the claimant is given a right to recover attorney fees in any action brought against the company.

In my experience, this would enormously increase the cost of this system because the insurer would withhold payment even though he has the most reasonable reason to doubt credibility of the claim at

such extreme peril that the insurance company might pay the claim and then pass the cost of the additional claim on and this will cause increased rates in the future.

Our recommendations and reasons for them are all stated in the report and recommendations of the special committee on automobile accident reparations of the American College of Trial Lawyers, of which committee I had the honor to be chairman, and I commend them to you for your consideration.

Thank you.

(Vol. 1, executive summary of recommendations and conclusions of the Governor's automobile accident study commission of California, follows:)

GOVERNOR'S AUTOMOBILE ACCIDENT STUDY COMMISSION



VOLUME I EXECUTIVE SUMMARY OF RECOMMENDATIONS AND CONCLUSIONS

DECEMBER, 1970

IN ACCORD WITH CHAPTER 1256
1967 GENERAL STATUTES
(Assembly Bill 764)
(Assemblyman George Zenovich)

COMMISSION'S RECOMMENDATIONS

LEGISLATIVE SUPPORT BILLS

Reparations - Page 21	Senate Bill No. 38:
Recommendation No. 4 - - - - -	Mandatory Medical Payment \$5,000
Prevention - Page 67	Senate Bill No. 42:
Recommendation No. 7 - - - - -	Low-Speed Crash Motor Vehicle Damage
Reparations - Page 16	Senate Bill No. 43:
Recommendation No. 2 - - - - -	Comparative Negligence (Repeals Contributory Negligence)
Reparations - Page 22	Senate Bill No. 44:
Recommendation No. 5 - - - - -	Increase Financial Responsibility Limits to \$20,000/40,000/10,000
Reparations - Page 20	Senate Bill No. 45:
Recommendation No. 3 - - - - -	Mandatory Uninsured Motorist Coverage
Consequences - Page 45	Senate Bill No. 63:
Recommendation No. 5 - - - - -	Sanctions to Curtail Solicitations for Legal Services
Consequences - Page 41	Senate Bill No. 122:
Recommendation No. 2 - - - - -	Arbitration Not In Excess of \$5,000
Reparations - Page 27	Senate Bill No. 381:
Recommendation No. 8 - - - - -	Collateral Source Rule
Consequences - Page 46	Senate Bill No. 384:
Recommendation No. 6 - - - - -	Contingent Fees
Prevention - Page 57	Senate Concurrent Resolution No. 3:
Recommendation No. 3 - - - - -	Mandates Department of Motor Vehicles to Direct Study on Drinking Driver
Consequences - Page 43	Senate Concurrent Resolution No. 4:
Recommendation No. 3 - - - - -	Urges Adoption Short Cause Personal Injury Action Procedures in \$5,000- \$10,000 Cases



Governor's Automobile Accident

Study Commission

RONALD REAGAN, GOVERNOR • JUDGE DAVID COLEMAN, CHAIRMAN

December 18, 1970

Honorable Ed Reinecke
Lieutenant Governor
President of the Senate

Honorable Bob Monagan
Speaker of the Assembly

State Capitol
Sacramento, California

Gentlemen:

It is my honor to transmit the final report of the Governor's Automobile Accident Study Commission in accord with Chapter 1256 of the 1967 General Statutes. Copies of the report have been separately transmitted to Governor Reagan. The final report documents the principal recommendations and conclusions emanating from our study of automobile accident prevention, consequences and reparations.

In order to enhance the utility of the recommendations contained herein, Volume I - Summary of Recommendations and Conclusions - succinctly states the Commission's principal findings. Volumes II and III document the supporting material utilized by the Commission.

We hope that the Commission's study will encourage and assist in making the required changes in order to better serve the interests of the citizens of California.

Sincerely,

For the Commission

JUDGE DAVID COLEMAN
Chairman

C O N T E N T S

VOLUME ONE

	Page
LETTER OF TRANSMITTAL	
AUTHORIZATION	1
STUDY ACTIVITIES	3
SUMMARY OF RECOMMENDATIONS	5
DISCUSSION OF RECOMMENDATIONS AND CONCLUSIONS	13
A. REPARATIONS	14
B. CONSEQUENCES	38
C. ACCIDENT PREVENTION	49
CONCLUSION	70

AUTHORIZATION

In accord with Section 2, Chapter 1256, Statutes of 1967, the Governor's Automobile Accident Study Commission was established. The Commission was composed of four Senators, four Assemblymen, and eight Members at Large:

Legislative Members

Senate

Hon. Hugh M. Burns
 Hon. Randolph Collier
 Hon. Richard J. Dolwig
 Hon. John L. Harmer

Assembly

Hon. Robert G. Beverly
 Hon. John V. Briggs
 Hon. Bob Moretti
 Hon. George N. Zenovich

Members at Large

Judge David Coleman (Retired), Chairman
 Mrs. Catherine Vollmer, C.P.C.U., Vice Chairman
 Robert G. Beloud, Attorney
 Kenneth E. Duffey, M.D.
 C. Hugh Friedman, Attorney
 Louis W. Niggeman, President,
 Fireman's Fund American Insurance Companies
 Richard V. Patton, Vice President and General Manager,
 California State Automobile Association
 Dr. Irving Pfeffer, Professor of Insurance, U.C.L.A.

In accord with Section 3, Chapter 1256, Statutes of 1967, the Commission has undertaken a comprehensive study of various aspects of automobile accidents, consistent with its legislative mandate:

The Commission shall conduct a study of, and make suggestions regarding, automobile accidents, including their prevention and consequences as well as related insurance, motor vehicle and procedural laws bearing thereon, to determine whether these laws, together with the statutory rules of the road, most effectively contribute to the prevention of automobile accidents and the expeditious and adequate financial recourse of automobile accident victims. This study may include, but need not be limited to, a study of the existing common law tort liability system, as modified by statute, as it bears on present insurance, motor vehicle and procedural laws together with an evaluation of the feasibility of revising or modifying

said existing common law tort liability system and the relationship of the insurance, motor vehicle and procedural laws thereto; a study leading to some guidelines relating to greater certainty in the disposition of automobile accident consequences and consideration of necessary modifications of the statutory rules of the road as they may relate thereto; and consideration of all pertinent related laws of other jurisdictions bearing on these matters.

STUDY ACTIVITIES

The Commission's research and fact-finding activities were concentrated in three broad areas:

- Reparations. The Commission studied the existing tort liability system in California. Various reparation plans were reviewed and evaluated to determine the potential costs and benefits that might accrue to the citizens of California if a new plan were adopted. While reparations could be considered as part of the accident consequences study, the importance of the subject warrants its treatment as a separate topic.
- Accident Consequences. The Commission studied several aspects of automobile accident consequences: (1) emergency medical services, (2) court congestion due to automobile accident cases, (3) police services, and (4) vehicle design.
- Accident Prevention. The Commission studied a wide range of accident prevention factors: (1) highway safety engineering, (2) driver licensing, (3) driver behavior, (4) driver education, and (5) law enforcement.

In two and one-half years, the Commission heard testimony from sixty-one expert witnesses during seventeen public hearings. In addition, expert testimony was submitted to the Commission in writing by a number of individuals

who were unable to appear before the Commission in person. The Commission also utilized the results of related studies undertaken during this same period by other State agencies, specifically:

- The Integrated Traffic Records System Study, by the California Highway Patrol, which will provide a statewide data base useful for statistical analysis purposes.
- The Optimum Driver Control/Traffic Enforcement Study (SR 160 - Dolwig), by the Department of Motor Vehicles, which will provide an operations research analysis of California drivers and the total driver environment.
- The study of driver education (AB 1486 - Veysey) by the Department of Motor Vehicles in conjunction with U.C.L.A.

The information obtained from these various sources and from secondary research was deliberated, evaluated and summarized during executive sessions and subcommittee meetings. It is the basis for the Commission's recommendations.

The Commission believes these recommendations will improve accident prevention programs and the methods of dealing with the consequences of automobile accidents, particularly the compensation of accident victims. The Commission also believes that these recommendations can be implemented in a reasonably brief period of time.

For ease of reference, the material presented in Volumes II and III is arranged in the same sequence as the material in the Summary of Recommendations and Conclusions.

1007

SUMMARY
OF
RECOMMENDATIONS
AND
CONCLUSIONS

SUMMARY OF RECOMMENDATIONS

A. <u>REPARATIONS</u>	Text Reference Page
1. APPROACH	
The Commission recommends that the Legislature adopt an <u>evolutionary approach</u> to improving California's <u>tort liability system</u> . The recommendations set forth below represent a logical program for improving the present system of compensating automobile accident victims for their losses.	15-16
2. COMPARATIVE NEGLIGENCE	
As the first step in such an evolutionary approach, the Commission recommends the adoption of a system of <u>comparative negligence</u> of the Wisconsin type and the <u>elimination</u> of the doctrine of contributory negligence, the last clear chance doctrine and the assumption of risk doctrine.	16-20
3. MANDATORY UNINSURED MOTORIST COVERAGE	
The Commission recommends making <u>mandatory uninsured motorist coverage</u> without the present right of rejection by the policyholder.	20-21
4. MANDATORY MEDICAL PAYMENTS COVERAGE	
The Commission recommends making it <u>mandatory</u> that with each policy of bodily injury insurance sold provision be made therein for <u>medical payments</u> of at least \$2,000 without the right of rejection by the policyholder.	21-22
5. LIMITS OF LIABILITY	
The Commission recommends that the Governor and the Legislature increase the existing minimum limits of \$15,000/30,000/5,000 now required by the Financial Responsibility Law to limits of \$20,000/40,000/10,000.	22-23

6. COMPULSORY LIABILITY INSURANCE

The Commission opposes compulsory purchase of automobile liability insurance coverage. 23-25

7. HOST-GUEST LAW

The Commission recommends the retention of the host-guest laws in California. 25-27

8. COLLATERAL SOURCE RULE

The Commission recommends the Collateral Source Rule should be retained in cases where the victim (or the party obligated by law to bear the expense of the victim's loss) has contributed to, or given consideration for the benefit, and in cases where the party paying the benefit is entitled to be subrogated for benefits recovered from the wrongdoer. 27-29

Where the benefit to the victim is simply a wind-fall, the Collateral Source Rule should not apply, and the verdict or award adjusted accordingly.*

9. NO-FAULT INSURANCE

The Commission recommends against the adoption of a system of no-fault insurance in California at this time. The Commission does recommend further study of such revolutionary concepts as the various no-fault plans.** 29-37

B. AUTOMOBILE ACCIDENT CONSEQUENCES

1. EMERGENCY MEDICAL SERVICES

The Commission recognizes that much has been accomplished in the area of emergency medical services as evidenced in the following reports: Survey of Emergency and Disaster Medical Services by the California Hospital Association and California Medical Association, Analysis of Data by the Bureau of Research and Planning, 39-41

* Mr. Louis W. Niggeman, a member of this Commission, does not concur.

** Mr. Louis W. Niggeman, a member of this Commission, does not concur.

CMA Division of Socio-Economics and Research, December, 1969; Final Proposal for an Emergency Medical Services Program for the State of California, prepared for the Assembly Committee on Health and Welfare, Honorable Gordon Duffy, Chairman, and the Advisory Committee on Emergency Medical Care, by Thomas Larke, Jr., February, 1970; and Ambulance Survey Final Report by the Department of Public Health, May, 1970; and finds that these reports have substantial value and should be implemented and steps taken immediately to develop the proper needed funding.

2. MANDATORY ARBITRATION OF CLAIMS

The Commission recommends the adoption of legislation to provide a system of mandatory arbitration of claims under \$3,000 (similar to the Philadelphia Plan, except that there be one arbitrator instead of three).

41-43

3. SHORT CAUSE PERSONAL INJURY ACTION

The Commission recommends the adoption of a short cause personal injury action procedure as presently practiced in Los Angeles County for the expeditious trial of simple personal injury cases.

43-45

4. FALSE OR FRAUDULENT CLAIMS

The Commission recommends that strict sanctions should be imposed upon those who intentionally make claims for personal injury or property damage known by them to be false or fraudulent and upon those who assist in the making of such claims with knowledge of their false or fraudulent character.

45

5. DIRECT CONTACT SOLICITATION

The Commission recommends legislation to prohibit direct contact solicitation in automobile accident cases by investigators, licensed or otherwise.

45-46

6. REGULATION OF CONTINGENT FEES

The Commission recommends that a court-administered plan be devised to regulate contingent fees as necessary to avoid any abuses.

46-48

C. AUTOMOBILE ACCIDENT PREVENTION

1. RESEARCH COORDINATING COUNCIL AND CENTER

The Commission recommends that there be created within the Business and Transportation Agency, Office of Traffic Safety, a Research Coordinating Council and Center with the responsibility and authority for the development and implementation of a management information system which will furnish information to and secure information from all research entities dealing in traffic safety and traffic medicine; and it is further recommended that the necessary funding to successfully carry out and make effective such a program be provided.

50-53

The Commission wishes to commend the efforts of the Office of Traffic Safety and the California Highway Patrol, who are coordinating an integrated statewide traffic records system that is being devised by the Division of Highways, California Highway Patrol, Judicial Council and the cities and counties, and the Department of Motor Vehicles. It is the Commission's recommendation that this program in the cities, counties, and State be implemented as quickly as possible.

2. DRIVER EDUCATION STANDARDS

The Commission recommends that a uniform standard for the teaching of driver education in the public schools in the State of California be developed for those persons between the ages of 15 and 18; that Section 18252.2 of the Education Code be amended to read: "A qualified instructor is one who

53-56

holds a single subject credential or who holds a valid prior credential authorizing instruction in automobile driver education and driver training"; that a textbook be developed under the supervision of the Department of Motor Vehicles and the recommended Research Coordinating Council and Center; that driver education be a required subject equivalent to a full school semester and given equal emphasis with other single subjects; that a multiphase approach to driver training, incorporating either simulator or driving range experience in addition to on-street driving experience, be included as part of the curriculum; that the Department of Motor Vehicles shall require of the commercial driving schools the same standards as those required of the public schools.

3. DRINKING DRIVERS

The Commission recognizes that drinking drivers should be classified into several classifications. The Commission, therefore, recommends that a schedule of mandatory fines and/or imprisonment for first offenses for drunk driving be developed. The Commission also recommends that all persons convicted on a second offense for drunk driving be referred to a medical advisory board for examination and rehabilitation. The court would have the authority to enforce compliance with this probation program by imposing a jail sentence for noncompliance.

57-60

The Commission recognizes and applauds the establishment of the Office of Alcohol Program Management and feels it should be adequately funded and staffed to accomplish its objectives.

4. DRIVER LICENSING

The Commission recommends to the Department of Motor Vehicles that the scope of knowledge of the driver's license applicant should include, but not be limited to, familiarity with the laws and rules of the road, his ability to detect and handle the hazards of the road, and

60-64

should consider methods of such examination other than that presently being practiced.

The Commission takes cognizance of high risk drivers in various age groups and that these risks reflect both attitudinal and physical problems. The necessary techniques for identification and control require further research and implementation through the licensing process.

The visual requirements for license applicants shall include a check of peripheral vision and glare resistance or recovery check in addition to present vision checks.

The Commission recommends that more stringent road tests be given than are presently under-taken in appropriate cases.

5. HIGHWAY SAFETY PROJECTS

The Commission has followed with interest the projects within the State which are testing the utility of helicopters for multiservice capabilities; of traffic sensor systems for the detection and early correction of potentially hazardous problems caused by congestion; of the possibilities of using closed circuit television for observation and early detection of potential traffic problems; and recommends that the State of California and the agencies having a responsibility for traffic safety to continue such experimentation in the interests of developing practical and effective techniques, methods, and devices for reduction of accidents.

64-66

The Commission recommends that the cities and counties be required to adopt in their highway engineering the standards now governing the Department of Public Works, Division of Highways, in such problems as corrective treatment for guardrail ends; protection of bridge abutments; construction of median barriers; replacement of hazardous sign and lighting supports with breakaway supports; development of adequate lighting at proper intersections; removal and/or protection of hazardous fixed objects within the right-of-way, such as trees; and other highway improvements too numerous to detail in this report.

6. PROTECTION FOR MOTORCYCLISTS

The Commission recommends that legislation be enacted in California to comply with the Federal Standards in the area of helmets and eye protection for motorcyclists.

66-67

7. COLLISION DAMAGE SPECIFICATIONS

The Commission recommends that legislation be enacted to prohibit the sale of motor vehicles in California unless said motor vehicles can withstand motor vehicle crash damage at speeds of up to fifteen miles per hour; that no later than January 1, 1972, such vehicles be able to withstand crash damage of five miles per hour front-end and rear-end collisions; and that no later than January 1, 1973, such vehicles withstand crash damage in ten mile per hour front and rear-end collisions; and that no later than January 1, 1974, such vehicles withstand any collision damage at fifteen miles per hour; that the State should be authorized to seek injunctive relief restraining the sale of motor vehicles in instances in which manufacturers of vehicles being sold in the State have not met collision damage specifications required by law.

67-69

DISCUSSION
OF
RECOMMENDATIONS
AND
CONCLUSIONS

A. REPARATIONS

APPROACH

The Commission recognizes that there is valid and widespread public dissatisfaction with the present lawsuit system of automobile accident reparations. Among the often repeated criticisms of the present system which this Commission heard were: (1) the system is too expensive; (2) the system often brings undue hardships because of long delays in the courts; (3) the system often produces awards which have no equitable relationship to the loss sustained; (4) the system sometimes prevents compensation altogether for the deserving victim.

As the Commission reported in its Second Interim Report to the Governor and the Legislature, the many proposals and counterproposals for reform heard by the Commission can be divided into two basic approaches: the evolutionary approach and the revolutionary approach.

The evolutionary approaches presented to the Commission would not require any radical departures from the present system of tort liability. They would modify the present system by applying enlightened legal principles and procedures which would correct existing deficiencies and adapt the system to current socio-juridical conditions.

The revolutionary approaches presented to the Commission represent sharp departures from our traditional tort liability system. They are untried and unproved, and would require extensive legislative action to implement.

In its examination of these alternatives, the Commission heard testimony from sixteen individuals: representatives of government, the Bar and the insurance industry. The Commission also examined closely the proposals which have been presented in other states, notably Connecticut, Massachusetts, New York and Wisconsin. After due deliberation, the Commission concludes that

evolutionary improvements in the present tort liability system will best serve the interests of the people of California. As a first step in this evolutionary process, the Commission recommends that California adopt the doctrine of comparative negligence as presently practiced in Wisconsin.

COMPARATIVE NEGLIGENCE

Under the present system of tort liability, an individual injured in an automobile accident may not recover from the person who negligently caused the accident if the injured party was in any way negligent himself and his negligence contributed as a proximate cause of his injury. Thus persons who are slightly at fault are, in theory, prevented under the present system from receiving compensation in claims against persons grossly at fault by reason of the doctrines of contributory negligence and assumption of risk.

The argument has been heard that a form of comparative negligence is currently being practiced by juries in California when they sometimes disregard the court's instructions concerning contributory negligence and render a verdict for the plaintiff even when the plaintiff has been guilty of negligence to some extent. The Commission does not believe that such de facto use of comparative negligence is justification for retaining the present system as it is presently practiced. Only a legislative mandate which establishes sound legal principles of recovery in automobile accident cases will fill the need to improve the tort liability system.

In January, 1969, a Special Committee on Automobile Accident Reparations of the American Bar Association recommended "That the states adopt a Wisconsin type of comparative negligence system supported by a special

verdict procedure."¹ The report describes the Wisconsin system:

Effects of a Change to Wisconsin Type of System
of Comparative Negligence

We believe that a change to a system of comparative negligence of the type found in Wisconsin, accompanied by universal financial responsibility, will accomplish, within the framework of the present common law tort system, a great advance toward the objectives of those who are critical of that system.

The difficulties in measuring degree of fault seem to have been sufficiently overcome in Wisconsin to justify our confidence that we are not merely substituting a group of new difficulties for those experienced under the contributory negligence rule. If the Wisconsin statute is followed as a model, fewer cases will be denied any recovery, and the size of the award will be moderated. If it does not have a moderating effect, the result will be some increase in insurance costs.

The Wisconsin comparative negligence law (Wisconsin Statutes, Sec. 331.045) eliminates contributory negligence as a bar to recovery if the fault of the defendant is established and the defendant's negligence exceeds that of the plaintiff. Recovery is diminished proportionately to the negligence of the person recovering. For example, if 40 percent of the negligence is attributed to the plaintiff, the damages are reduced by 40 percent. If the attribution is 60 percent to the plaintiff and 40 percent to the defendant, there is no recovery. If the attribution is 50-50, there is no recovery.

Special verdicts are used. The jury answers specific questions, such as: Was the defendant negligent? If so, was the plaintiff's negligence a cause of the collision? If both defendant and plaintiff were negligent and taking the combined negligence as 100 percent, what percentage is attributable to the defendant? To the plaintiff?

The next question the jury answers is what sum of money will fairly and reasonably compensate the plaintiff with respect to the various categories of damages. The judge does the rest. The jury is not to concern itself with the final amount. John A. Decker, a circuit court judge in Wisconsin, says that "Wisconsin trial lawyers and judges believe that the jury's application of comparative negligence is satisfactory" and states his

¹ Report of the American Bar Association, Special Committee on Automobile Accident Reparations, January, 1969, p. vi.

opinion that "a comparative negligence system which permits the jury to reduce damages, and to know and determine the ultimate recovery, is wrong."²

The adoption of a comparative negligence law of the Wisconsin type should help reduce court congestion in the large metropolitan areas. There will be fewer cases in which the question of whether plaintiff may recover is in issue at all. As experience is gained with the comparative negligence law, the assessment of the degree of fault will be more easily determined, enabling carriers and the claimants or their representatives to reach a settlement close to that which would be likely to be awarded by the courts. Fewer cases will reach the courtroom since many more cases will be settled directly between the claimant and the insurer.

The Commission finds that the adoption of such a comparative negligence law will represent a logical, just step in the evolution of a fair and flexible system of automobile accident reparations designed to meet the needs of the California driving public in the nineteen seventies and beyond.

The adoption of such a law of comparative negligence in California requires the elimination of the doctrines of contributory negligence and assumption of risk, both of which operate, in theory, to bar recovery by an injured party. The Commission believes also that the adoption of a law of comparative negligence of the Wisconsin type eliminates the need for retaining the present doctrine of last clear chance. This doctrine developed primarily as a response to the application of the doctrine of contributory negligence, providing that if the defendant was able to avoid the accident at the last moment by exercising the proper care and control and failed to do so, the plaintiff could recover even

² Ibid., p. 75.

though he was not himself free from negligence. Such a principle is incompatible with the law of comparative negligence which we are recommending and, therefore, should be eliminated.

The following is a model comparative negligence bill of the type passed in Wisconsin.

AN ACT CONCERNING the elimination of contributory negligence and substitution of comparative negligence therefor.

Be it enacted by the Senate and House of Representatives in Legislative Assembly convened:

Section 1. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Section 2. STATEMENT OF PURPOSE: To remove contributory negligence as a defense and in place thereof to diminish the claimant's recovery to the extent of such negligence as compared.

AN ACT CONCERNING special verdicts.

Be it enacted by the Senate and House of Representatives in Legislative Assembly convened:

Section 1. The court may, and when requested by either party, before the introduction of any testimony in his behalf, shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of written questions, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing.

It shall be discretionary with the court whether to submit such questions in terms of issues of ultimate fact, or to submit separate questions as to the negligence of each party, and whether such negligence was a cause without submitting separately any particular respect in which the party was allegedly negligent. The court may also direct the jury, if they render a general verdict, to find upon particular questions of fact.

Section 2. STATEMENT OF PURPOSE: To authorize juries in negligence cases to render special verdicts based upon written questions when the court so rules or when requested by either party and to provide discretionary authority in the presiding judge to maintain control over the substance and structure of the question.

UNINSURED MOTORIST COVERAGE

To further reduce the number of uncompensated automobile accident injuries, the Commission recommends that uninsured motorist coverage should be made mandatory; that the present right of rejection by the policyholder be eliminated. The typical uninsured motorist provision provides that the insured policyholder, his family and guests will be compensated by the policyholder's insurer for injuries received in an accident where the negligent driver is uninsured and not otherwise financially responsible. The rates for this coverage for minimum limit policies are nominal, averaging from \$6 to \$8 annually.

The State of California by legislation requires that this coverage be provided by insurance underwriters doing business in the State. However, the legislation does not require that this coverage be accepted by the purchaser, and the purchaser may now reject the coverage by signing a written

statement to that effect. In its Report to the Legislature of January, 1967, the Financial Responsibility Study Committee noted that about two percent of California's insured motoring public elects to reject the uninsured motorist coverage. (That Committee also recommended making mandatory the purchase of uninsured motorist coverage with all policies of automobile liability insurance.)³ While this two percent of insureds not carrying the uninsured motorist coverage does not represent a significant element of the total insured driving public, the Commission finds that a mandatory uninsured motorist provision would reduce even further the number of individuals who receive no compensation for injuries suffered in automobile accidents. It would cover passengers and guests as well as drivers and members of the family household who are injured as pedestrians by uninsured motorists.

It should be noted that California presently includes in the definition of uninsured motorist the individual whose insurance carrier has become insolvent.

The implementation of this recommendation by the legislature should not have a significant impact on the insurance premium paid by Californians since, as noted above, only about two percent of insured California drivers do not presently carry this coverage.

MEDICAL PAYMENTS

The Commission recommends legislation to require inclusion of medical payments coverage of at least \$2,000 in each policy of bodily injury liability insurance sold. Such coverage would reduce the number of individuals

³ Report to the Legislature of the Financial Responsibility Study Committee, January, 1967, p. 24.

who receive limited or no compensation for injuries suffered in automobile accidents. Presently, insurance companies doing business in California are not required to write medical payments coverage into their automobile liability insurance policies. When provision for medical payments is included in automobile liability insurance policies, it is a first-party coverage, the policy purchaser buying the coverage to benefit himself, his family and guests. Adoption of this Commission's recommendation would simply extend this first-party coverage to all Californians who purchase automobile liability insurance. The Commission is in agreement with the position of the American Mutual Insurance Alliance, presented to the Commission in a letter of May 14, 1970:

The Alliance favors the requirement that all automobile liability policies covering non-fleet private passenger motor vehicles contain this coverage. A minimum limit of \$2,000.00 per person does not appear unreasonable. This requirement, of course, would not alter the tort (fault) system. A statute could provide that, after a claimant has been paid the automatic medical benefits, his insurer may seek reimbursement from the party at fault (if any) or that person's insurance company. The issue of liability and reimbursement as between admitted insurance companies should be decided by mandatory inter-company arbitration, thereby reducing expenses and the burden on the courts. The important thing is that the claimant is paid first and then any necessary readjustment of the insurance loss is made between the companies. Such coverage, as now, should include the named insured, members of his family residing in the same household, and guest passengers. In addition, the coverage should be extended to pedestrians.⁴

LIMITS OF LIABILITY

This Commission has taken cognizance of the soaring costs of automobile insurance in the United States in the last decade. In the Report of the

⁴ See letter of Mr. Charles Brown, American Mutual Insurance Alliance, May 14, 1970.

American Bar Association, Special Committee on Automobile Accident Reparations, the Committee points out, concerning these costs:

The chief reason for this is that the value of a claim for damages reflects the costs of its principal ingredients. Those ingredients are: cost of medical services, hospital services, loss of wages, cost of repairing damaged automobiles and, that more difficult to measure item, the value of pain and suffering.⁵

Concerning the costs of medical/hospital care alone, that Committee went on to point out that:

We are told that the consumer price index shows an increase in automobile insurance rates of 45 percent since 1957-1959 while the whole index rose only 18 percent. (Statement of Consumer Federation of America.) But we are also informed that from 1956 to 1967 the cost of hospital care countrywide jumped close to 100 percent, and physicians' fees 43 percent. (Source: American Mutual Insurance Alliance.)

The Commission finds that the limits of bodily injury liability coverage presently required under California's Financial Responsibility Law of \$15,000/30,000/5,000 are unrealistic in view of the inflationary costs of medical/hospital care, wages, and general damages. The Commission therefore recommends that the Governor and the Legislature increase the existing minimum limits to \$20,000/40,000/10,000.

COMPULSORY LIABILITY INSURANCE

Compulsory liability insurance is a frequently recommended solution to the problem of the uncompensated automobile accident victim.⁶ In the last two and one-half years, the Commission has investigated carefully whether the State of California should adopt a compulsory automobile liability

⁵ Report of the American Bar Association, Special Committee on Automobile Accident Reparations, January, 1969, pp. 105-106.

⁶ Ibid., p. 123.

insurance law. It is the conclusion of this Commission that making compulsory the purchase of automobile liability insurance coverage is not in the best interests of the citizens of California at this time. Two basic factors motivate this conclusion: a compulsory automobile liability insurance system is expensive to administer and such a system has a tendency to create rather than ameliorate the difficulties of an automobile insurance system.

In its Report to the Legislature, the Financial Responsibility Study Committee cited the costs of administration of New York's Financial Security Law. The administrative costs in 1964-1965 (fiscal year) were \$3,576,113.62, not including enforcement costs on which there were no cost figures available.⁷ Were California to adopt compulsory automobile liability insurance, the cost of the administration of such a law could easily match or exceed the costs encountered in New York.

The Commission also found that such laws often create more difficulties than they solve. In his appearance before this Commission on May 22, 1969, Massachusetts Insurance Commissioner C. Eugene Farnam urged the repeal of his state's compulsory insurance law:⁸

My belief is that our compulsory system does not meet fully its principal purpose -- that of assuring payment of all just accident claims. It does not protect our motorists and citizens from uncollectible claims arising out of accidents caused by uninsured out-of-state drivers, hit-and-run drivers, the drivers of stolen automobiles and other drivers illegally upon our highways.⁹

Commissioner Farnam went on to state that:

We have very high numbers of claims being filed as a result of each Massachusetts accident. The personal

⁷ Report to the Legislature, Financial Responsibility Study Committee, January, 1967, p. 76.

⁸ See Hearing of the Governor's Automobile Accident Study Commission, May 22, 1969, p. 6.

⁹ Ibid., p. 6.

injury claims frequency in the Commonwealth is more than 1.8 times that of the next highest state (which also happens to be a compulsory state), and three times the national average. Bodily injury claims paid in Massachusetts and New York are far above the national average....¹⁰

....This claim frequency is directly related to our high insurance costs and also supports the conclusion that compulsory has made Massachusetts motorists more claims conscious than those in other states....To quote from a survey conducted by Hunting and Neuwirth on claim consciousness, they observe: "It may be that compulsory insurance, by making people increasingly aware of the existence of insurance and forcing them to obtain coverage, has encouraged people to think of themselves as being entitled to compensation for injuries."¹¹

A high degree of credibility must be afforded these statements of Commissioner Farnam. He has had the opportunity to observe first-hand the effectiveness of Massachusetts' compulsory automobile insurance law. Primarily on the basis of Commissioner Farnam's testimony and the data regarding the high costs of administering a compulsory liability insurance law, this Commission has recommended against the adoption of such a law in California.

HOST-GUEST LAW

Since 1872, the policy of the State of California, reflected in its statutes, has been that an individual is held responsible for any injuries caused to another person through failure to exercise ordinary care or skill in the conduct of his person and his property.¹² However, there is an exception to this rule embodied in Vehicle Code Section 17158 which, in essence, precludes persons riding in automobiles as guests of the host from recovering damages for injuries suffered as a result of the host's failure

¹⁰ Ibid., p. 6.

¹¹ Ibid., p. 7.

¹² See Hearing of the Governor's Automobile Accident Study Commission, Testimony of Attorney Jack Levitt, March 5, 1970, p. 72.

to exercise ordinary skill and care. The primary rationale advanced in support of this provision is that it fosters a "Good Samaritan" spirit and prevents collusion by host and guest and their consequent fraudulent claims.

A number of arguments have been urged on behalf of repeal of this provision:

First,....that judicial interpretation has greatly modified and would continue to modify the statute in an endeavor to allow recovery to litigants. Secondly,....that the underlying reasons that were given for the legislation at the time of its enactment are no longer applicable, if they ever were at the time. And thirdly,....that this exception, the guest statute, to the basic policy of the State, that everyone is responsible for injuries caused by them for lack of ordinary care is an unrealistic, arbitrary and outmoded exception.¹³

The Commission found some support for these arguments in its analysis of the use of this provision in negligence claims. However, it appears that judicial interpretation has greatly modified the potential such a provision has for denying the legitimate claims of guests injured as result of the host's failure to exercise ordinary care. Under the Vehicle Code, a passenger is not a guest if the host receives any compensation whatever for the transportation. California courts have broadly construed "compensation" to include almost any direct or indirect benefit received by the host. Also, the negligence of the host is not imputed to the guest, thereby permitting him to recover against another negligent driver responsible for the accident without the possibility of his host's contributory negligence being imputed to him. Since the Commission has found that this provision has not been narrowly construed to prevent the realization of claims not barred by statute, the Commission recommends the retention of the host-guest provision in the Vehicle Code. The Commission finds that retention of this provision

¹³ Ibid., pp. 72-73.

will continue to operate as a deterrent to collusion and fraudulent claims and will avoid any potential rise in insurance rates in California resulting from increased automobile accident litigation.

COLLATERAL SOURCE RULE

By case law in California, it is the rule that the amount of recovery to be awarded the victim of another's wrong is not to be diminished by the benefits the victim may have received from some source other than the wrongdoer. The rule is justified on the basis that the contribution made to the victim was intended for the benefit of the victim and not for the benefit of the party at fault.

The rule, known as the collateral source rule, has been both criticized and defended. Several proposals have been advanced to abolish the collateral source rule in order to eliminate multiple tort recoveries (e.g., more than one recovery for the same item of damage) and thus, hopefully, reduce insurance premiums.

The chief argument against the collateral source rule is that the victim ought not to be compensated more than once. If the victim's medical bills are paid by some insurance procured by him, it is said, then he ought not to be enriched by collecting again from the careless driver whose fault initially caused those bills to be incurred.

The basic fallacy of this argument is that it assumes that in all cases of more than one recovery by the innocent victim he is thereby unjustly enriched. On the contrary, first-party accident insurance is mainly procured by provident persons in a risk-sharing system for alleviating the catastrophic consequences of sudden and unanticipated medical costs.

The subscriber to such insurance pays a charge which, on a statistical average, will reimburse him for the hospital bills and medical bills he will necessarily incur.

If the insurance plan is financed by employer payments under an employee welfare plan, it should not be assumed the employee receives charity. It has become usual for unions to negotiate for health and accident insurance fringe benefits in wage contracts. The cost of fringe benefits is counted as part of the wage package. The employee receives his hospital and medical bill insurance in the place of cash wages. There is no doubt that he earns the premiums, by his labor. In effect he authorizes the employer to deduct from his paycheck the cost of the premium and pay it directly to the insurance fund for the employee's benefit.

The person who pays the premium for accident insurance out of his income denies himself other goods he might have purchased. The argument that the wrongdoer should not have to pay because some other insurance fund paid the doctor or the hospital ignores the basic truth that the victim paid the insurance fund so that it could pay the doctor and hospital.

The fact is that very few victims receive pure charity. They receive pension benefits, or sick benefits, or accident insurance benefits they have earned. There is no reason to take such benefits away from the victim and give them to the wrongdoer.

On the other hand, the Commission recognizes that some of the disabled and injured do receive benefits which they have not prepaid. The broken leg may be set and treated in a charitable clinic maintained by philanthropic donations. The victim may be a passenger who receives the medical payment benefits that come to him from the owner's insurer with no contribution on the passenger's part. In these, and similar cases, the correct

analysis would be to state that the victim sustained no loss of present funds or past savings, and should not be reimbursed simply because there was no loss.

The true test should not be based on whether or not the wrongdoer receives benefits, but whether the victim has sustained the loss directly, or has anticipated the chance of loss and has prepaid it.

The Commission recommends a modification of the collateral source rule to eliminate multiple recovery in those instances where the recovery has come from sources unrelated to contribution in services or otherwise by the victim who receives the benefit, or from one responsible for the victim's support, such as husband, wife, parent and the like.

Even in these cases, it must be borne in mind that the benefit may come with lien attached. If the beneficiary must return the benefit in the event of recovery, then obviously he must retain the right to include that sum in the general recovery to which the donor's lien will attach. Examples of these situations are benefits received from the Armed Services, Workmen's Compensation benefits, and in cases where the one paying the bills is subrogated to the victim's right of recovery vs. the wrongdoer.

NO-FAULT INSURANCE

This Commission has stated its recommendation for evolutionary improvements in the tort liability system as opposed to revolutionary changes. Of the proposals for changes in the present tort liability system, the various "no-fault" proposals have received the most attention. The first proposal

for a no-fault plan was presented by Professors Robert E. Keeton and Jeffrey O'Connell in their book, Basic Protection for the Traffic Victim, published in 1965. Since that time, this plan and variations of it have been proposed in a number of states. In February, 1970, Richard E. Stewart, Superintendent of Insurance for the State of New York, presented a report to Governor Rockefeller proposing that New York adopt a no-fault insurance law.¹⁴ The plan has since been presented to the New York Legislature where it failed to pass. The State of Massachusetts has recently passed a no-fault insurance law which has received widespread publicity. The difficulty which that state has faced in the implementation of the law has received equally wide publicity.¹⁵ The American Insurance Association has also authored its version of a no-fault insurance plan.

Since the Keeton-O'Connell proposal was the first and prototype of later no-fault plans, the Commission feels it appropriate to briefly outline here the major points of that plan. In their article entitled Basic Protection Automobile Insurance,¹⁶ Professors Keeton and O'Connell describe the key features of the proposal:

The proposed reform, called the Basic Protection plan, has two main features.

The first is to develop a new form of automobile insurance, called Basic Protection insurance. It is an extension of the idea of the medical payments coverage - a supplemental coverage one can buy in an automobile insurance policy today. Medical payments coverage reimburses actual medical expenses up to a stated limit, say \$500, regardless of who was at fault in the accident. Basic Protection insurance would do the same for all out-of-pocket loss - wage loss, for example, as well as medical expense - up to a limit of \$10,000 per person.

¹⁴ Automobile Insurance...For Whose Benefit? A Report to Governor Nelson A. Rockefeller, 1970.

¹⁵ TIME, August 31, 1970, p. 66.

¹⁶ Crisis In Car Insurance, edited by Robert E. Keeton, Jeffrey O'Connell, John H. McCord, University of Illinois Press, 1968.

As in the case of medical payments coverage, one would buy this coverage for himself, his family and guests, and he would make his claim and recover his benefits from his own insurance company. The insurance company would be required to pay month by month, as doctors' bills, hospital bills, or lost wages occurred, rather than delaying as under the present system until the injured person and the company could agree on a lump sum or have their disagreement resolved in a long-delayed trial.

The second main feature of the plan is that Basic Protection insurance would be coupled with a new law that would do away with claims based on negligence unless the damages were higher than \$5,000 for pain and suffering or \$10,000 for all other items such as medical expense and wage loss. This would mean that all but a very small percentage of the claims for injuries in automobile accidents would be handled entirely under the new Basic Protection coverage. The wasteful expense of bickering over fault - with all the cost of the time of investigators, lawyers, and courts spent on these questions - would be eliminated except in the few cases in which injuries were quite severe. This would reduce sharply the overhead of the present system and thus lead to lower insurance costs. Also, eliminating in the multitude of small cases the arguments that now occur over fault, lump-sum awards, and damages for pain and suffering would remove the chief opportunities for fraud and exaggeration existing under the present system. Although no one should expect that this would eradicate fraud completely, at least a substantial reduction would be achieved. This would not only help reduce costs but would be a good thing in itself.

Another reduction of waste and of insurance costs would be gained by paying a victim only to the extent that he had an actual out-of-pocket loss. If he received payment for his loss from some other source, such as sick leave pay or Blue Cross benefits. Basic Protection insurance would not pay him again for that loss. At the present time, an injured person can often make a profit by incurring extra medical expense. For example, if he has automobile medical payments insurance and Blue Cross coverage (in a common form under which Blue Cross does not get its payment back from the negligent party), he may make \$40 by having a set of X-rays for which the charge is \$20, since he gets \$20 from his medical payments insurance company, \$20 from his Blue Cross, and another \$20 when he settles with the insurance company covering the other driver's negligence. In addition he might even make \$40 to \$60 more since payments for

pain and suffering are often settled on the basis of an unofficial rule of thumb allowing \$2 to \$3 for every dollar expended or lost by the victim.

Another way in which the Basic Protection plan permits one to reduce his automobile insurance cost is through a new method of handling payments for pain and suffering. At present, the compulsory insurance laws (in Massachusetts, New York, and North Carolina) require one to buy insurance that pays pain and suffering damages to the other persons he carelessly injures. The financial responsibility laws of the other 47 states, though not requiring such insurance, strongly encourage it. In contrast, the new plan provides that Basic Protection benefits be paid by one's own insurance company rather than the other driver's insurance company. Thus, under the Basic Protection plan it becomes feasible to give a policyholder a choice whether he wants coverage for pain and suffering - a choice that no one has under the present system, because obviously we cannot allow people a choice not to pay others. Under the Basic Protection plan, a policyholder may buy what is called Added Protection coverage providing payments for his pain and inconvenience up to the amount of \$5,000. (This is the amount of the Basic Protection exclusion of pain and suffering damages from negligence trials. Above that amount one can still claim for his pain and suffering in a negligence suit.) But he is free to decline pain and inconvenience coverage for the first \$5,000 if he prefers to reduce his insurance costs.

As originally drafted, the Basic Protection plan did not cover property damage. Recently, however, we have drafted a change under which a motorist has a two-fold choice about property damage insurance. (1) He can choose to include damage to his own car under a new coverage like Basic Protection coverage, along with a corresponding exemption from tort liability like that applying to personal injury under Basic Protection. (2) Or, instead, he can choose to omit this non-fault coverage for damage to his own car, carry coverage for damage he negligently causes to the cars of others who make this choice, and also be assured that he can recover for damage to his car, provided he can prove a negligence claim against some other driver. This would eliminate most of the negligence suits over damage to cars, because most people would make the first choice, under which negligence claims no longer arise. This would mean further premium savings at least to the policyholder who now carries both collision coverage (for damage to his own car) and liability coverage (for damage to other cars)-as most policyholders do.¹⁷

¹⁷ Ibid., pp. 43-45.

This Commission found two major arguments advanced in support of these no-fault plans. The plans would deliver benefits to more automobile accident victims faster than under the present tort liability system, and these benefits would cost less.

The Commission does not dispute that a no-fault recovery system could deliver benefits faster than does the fault system. The no-fault recovery system is based on a first-party contractual relationship between the insurer and the policyholder. Benefits under the plan are payable directly to the policyholder by the insurer, thereby eliminating any need for a determination of fault. It is admitted that under the present fault system, the accident victim often experiences delays in obtaining compensation from the insurer, in some cases the potential delay being so long that the accident victim is motivated to settle the claim early in the negotiations, especially if the immediate economic loss is substantial. These early settlements can sometimes be for amounts which do not fairly compensate the accident victim for his injuries.

Reduction in the costs of purchasing automobile insurance has also been advanced as a major argument in support of the various no-fault plans.

The savings under Basic Protection would be striking. An independent actuary has calculated that if Basic Protection were enacted in New York, not only would about 25 percent more people be paid than under the present system, but also automobile insurance costs would drop from 15 to 25 percent with coverage up to a higher per accident limit under Basic Protection (\$100,000 rather than \$10,000). Nine percent more savings (for a total of 24 to 34 percent) would be achieved if coverages of the same per-accident limit were compared. And all of these savings are, according to the actuary, a conservative estimate.¹⁸

In spite of these strong arguments in support of the no-fault plans, however, the Commission has found that such plans offer a number of

¹⁸ Ibid., p. 45.

substantial obstacles. Among the major problems, the Commission has found:

- Though no-fault plans such as the Basic Protection Plan appear to reduce the cost of automobile insurance substantially, there is an accompanying reduction in coverage. Basic Protection coverage offers the purchaser less coverage overall than the coverage normally held by today's insured motorist. Added protection is available to the purchaser in the form of optional coverage, at added cost, for pain and suffering, property damage and catastrophe losses.

- There would be increased administrative expense since the purchase of the Basic Protection coverage would be compulsory and the State would be forced to assume the burden of administering the Compulsory Insurance Law.¹⁹ There would also be an additional expense to the insurance underwriters in terms of the underwriter's increased responsibility in complying with the provisions of a Compulsory Insurance Law.

- There is one other "hidden" expense involved in any no-fault plan. In an accident involving a driver covered by the Basic Protection, where the accident occurs outside of the enacting state, the driver may be held liable for his negligence in causing the accident. The state where the accident occurred (assuming that state had not enacted a no-fault plan), would probably not be required to give full faith and credit to the insurance laws of the enacting state.²⁰ Consequently, the driver who leaves the enacting state would be forced to purchase optional extraterritorial coverage to protect himself against damage actions arising outside of his home state.

- There is no clearly acceptable plan for dealing with the problem of compensating the insured for damage suffered by his vehicle in a collision.

¹⁹ Ibid., p. 62.

²⁰ Cf. Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493 (1939).

The Keeton-O'Connell Plan offers a first-party "Added Protection Option" which, like the Basic Protection coverage, pays for loss without regard to fault as well as a "Liability Option" which is essentially the same coverage available at the present time in the form of collision coverage. The Stewart-Rockefeller Plan, on the other hand, makes the purchase of first-party collision coverage optional. The Commission found that making such coverage optional while at the same time eliminating the right to bring a third-party action could work a hardship on a great number of motorists. Presently, a motorist with the standard \$100 deductible collision coverage will suffer a maximum loss of \$100 as a result of vehicle damage to his car. He will probably suffer no loss at all if the damage was due to someone else's negligence and that negligent operator is financially responsible. By bringing a third-party damage suit against the negligent operator, he may recover the entire cost of repair to his car. Under the Stewart-Rockefeller Plan, this alternative would be foreclosed. Unless the individual purchased his own collision coverage, he is forced to bear the entire cost of repair to his automobile even though he did not cause the accident.

The proposed no-fault plans do not appear to offer any greater deterrent to fraudulent claims than does the present system. Under the Keeton-O'Connell proposal, for example, the right to sue for pain and suffering is eliminated up to \$5,000, but should the damages for pain and suffering exceed \$5,000 the accident victim may bring an action to recover the amount in excess. All claims under \$5,000 would be handled on a first-party basis under Basic Protection. Such a system could, in some cases, encourage inflated claims for pain and suffering in order to meet the \$5,000 minimum. The no-fault plan could thus result in fraudulent claims in this respect.

- The adoption of a no-fault plan could have an unfortunate effect on insurance rating techniques. Mr. R. V. Patton of the California State Automobile Association and a member of this Commission stated:

....all of a sudden the driving record of the individual becomes the least critical area of rating a risk. In other words, the premium you are going to charge the motorist is not going to be based upon his driving record per se; a good driver is going to pay less and a bad driver going to pay more. You're turning it completely around because now the important thing is what is that person's economic loss going to be if he is involved in an accident and who automatically becomes the best risk? It's the retiree; it's the student; it's the unemployed. And who automatically becomes the worst risk? It's the individual who is employed, making a good living, and who is apt to incur substantial expenses.²¹

The Commission finds that the potential problems of implementing a no-fault insurance plan offer substantial obstacles to the effectiveness of any such plan which might be adopted in California at this time. Any insurance system that is to be responsive to the needs of our modern mobile society must seek to satisfy a maximum number of legitimate claims without undue delay and at the lowest possible cost. The Commission has found the revolutionary no-fault proposals to contain ideas that have merit and which could improve the present tort liability system. However, these proposals have not been tested in practice long enough to reflect whether or not they really represent an acceptable alternative. The other recommendations of this Commission in the REPARATIONS area have been tested in practice and have been found to greatly improve the effectiveness of the present tort liability system. The Commission's recommendations in this area, when implemented, will accomplish many of those reforms called

²¹ See Proceedings of the Governor's Automobile Accident Study Commission, September 18, 1970, pp. 13-14.

for by the proponents of the no-fault proposals. And while the Commission is recommending against the adoption of a no-fault insurance plan in California at this time, we urge that the experiments with such plans in other jurisdictions be closely studied and the plans re-evaluated periodically.

B. AUTOMOBILE ACCIDENT CONSEQUENCES

EMERGENCY MEDICAL SERVICES

During the last two and one-half years, the Commission has heard and examined a great deal of evidence on the subject of emergency medical services and the relationship of these services to automobile accidents. Kenneth F. Duffey, M.D., a member of the Commission, has given a great deal of his time and energy in researching the problems of emergency medical services and addressing the question of what kind of improvements could be made in this area. Among the major concerns in the area of emergency medical services today as brought to the attention of the Commission by Dr. Duffey are:

- Absence of strong, adequately funded coordinating agencies at the State and county level with the authority and responsibility for planning and coordinating a statewide emergency medical services program.
- A need for more comprehensive training and licensing requirements for ambulance drivers and attendants.
- The necessity of establishing requirements for the number of emergency vehicles which should be available to a given geographical area.
- The necessity for coordinating emergency care services, particularly between rescue vehicles and emergency treatment sites.
- A need to develop new techniques for effecting the rescue of automobile accident victims, such as a helicopter rescue service of the type so successfully employed in Vietnam.
- A need for minimum standards for the type of equipment necessary for effective emergency room services, and for the number and experience required of emergency room personnel.

- A need for continuing research into the role of alcohol, marijuana, narcotics and other dangerous drugs in causing automobile accidents.

Only some of the major problems in the area of emergency medical services have been outlined. The Commission has found that many of the problems as outlined require a great deal of in-depth research, often involving members of the medical profession. Much is presently being done in California to develop a well-coordinated and adequately funded program of emergency medical services. The most recent studies available on the subject are: Survey of Emergency and Disaster Medical Services by the California Hospital Association and California Medical Association, Analysis of Data by the Bureau of Research and Planning, CMA Division of Socio-Economics and Research, December, 1969; Final Proposal for an Emergency Medical Services Program for the State of California, prepared for the Assembly Committee on Health and Welfare, Honorable Gordon Duffy, Chairman, and the Advisory Committee on Emergency Medical Care, by Thomas Larke, Jr., February, 1970; and Ambulance Survey Final Report by the Department of Public Health, May, 1970.

The Commission found that these reports represented some comprehensive research into the areas of emergency medical services and that each of the reports developed substantial data to support the recommendations found therein. Because these recommendations have been developed by competent researchers in the field of medical services, this Commission is not making any specific recommendations of its own in the area of emergency medical services. To develop such recommendations would be a duplication of the work already accomplished. The Commission therefore recommends that the programs and action steps developed in the above-mentioned reports should

be implemented and steps taken immediately to provide the proper and needed funding.

ARBITRATION

One of the most widely publicized aspects of automobile accident consequences is the length of time often required to litigate an automobile accident personal injury matter in the courts. The most recent report of the Judicial Council of California discusses the backlog currently facing California's Superior Courts:

The civil backlog in June, 1969, of 56,411 cases in these courts was the largest backlog on record and was more than double the 27,769 civil cases awaiting trial in June, 1967, prior to the change in the pre-trial rules. The backlog in June, 1969, was 32,143 higher (+132%) than in June, 1965, when many of the courts were having great success in reducing backlog and delay by the use of certificate of readiness procedures and was 14,543 higher (+35%) than in June, 1962, which was prior to the adoption of those procedures. It should be emphasized again, however, that currently cases are included in the backlog at a much earlier point in the proceedings than prior to the rule changes.²²

A number of solutions to this backlog problem have been proposed. Proponents of the no-fault insurance systems discussed earlier would make basic changes in the legal concepts and principles applied in cases of automobile accident reparations. Other, less revolutionary improvements, have been proposed also.

The Commission is recommending two basic procedural changes which could materially reduce the current backlog of personal injury litigation facing some of California's judicial districts. The first of these two recommendations concerns the adoption of legislation to provide a system of mandatory arbitration of claims under \$3,000 (similar to the Philadelphia Plan).

²² See the Annual Report of the Judicial Council of California, January 5, 1970, p. 100.

In 1957, the Pennsylvania Legislature, alarmed by the serious backlog in the Philadelphia courts, provided legislation enabling the then Municipal Court of Philadelphia to require the mandatory arbitration of civil matters where the amount in controversy was less than \$2,000 (later raised to \$3,000). The arbitration is accomplished by a panel of three members of the local bar association. A roster of available attorneys is maintained by the bar association and names are picked at random as the cases come in, the first name picked being the chairman of the panel. The panel must hold the hearing within 30 days of the appointment of the arbitrators. The panel must then render judgment on the matter within 20 days of this hearing. In less than 10 years of operation, the plan has handled 66,025 cases, of which 40,541 were disposed of by reports and awards.²³

The basic element of such a plan is the use of volunteer extra-judicial manpower. The Commission recognizes that valid arguments exist both in favor of and in opposition to the use of quasi-judicial arbitrators with no significant judicial training. However, the Commission finds that in those judicial districts having significant civil backlogs, the need to reduce the time necessary to conclude the litigation of a matter transcends those arguments against the use of such extra-judicial manpower.

The Commission further finds that a three-lawyer panel of arbitrators is not essential to the successful operation of the plan. The Commission therefore recommends that any such plan adopted in California employ the services of only one arbitrator. Using one arbitrator instead of three would reduce the cost of the plan. Cost savings are an important argument in support of this type of arbitration arrangement:

And the advantages of arbitrating small claims apparently don't end with clearing up court backlogs. The Philadelphia

²³ Zal, Report of the Arbitration Commissioner, LEGAL INTELLIGENCER (Philadelphia), January 2, 1968.

story is also one of reduced costs. Commissioner Bonnie estimates that the cost of arbitrating a case is about 10 times less than the cost of trying the same case in court. The sizeable difference stems from the elimination of the costs of salaries for court personnel, maintenance of courtrooms, payment of jurors, and other necessities of court operation.

The first appropriation from the city council for arbitration fees was pegged at \$85 per case. Since 1961, the allocation has been on the basis of \$70 per case. However, the actual cost per case has turned out to be only \$62. During the first 10 years, the total allocation for arbitrator fees was \$2,502,001 - an average of \$250,000 per year. As Commissioner Bonnie points out, this figure is many times smaller than what court trials of the same cases would have cost.²⁴

Based on the evidence of the effectiveness of the Philadelphia Plan, this Commission concludes that the adoption of such a plan in California at this time could significantly reduce the civil case backlog confronting the California courts, at the same time reducing the cost of operating the tort liability reparations system.

SHORT CAUSE PROCEDURE

As the second of the two procedural changes which could materially reduce the civil backlog in our courts, the Commission recommends the adoption of a short cause personal injury action procedure as presently practiced in Los Angeles County for the expeditious trial of simple personal injury cases. Judge Joseph A. Wapner, Presiding Judge of the Superior Court of Los Angeles County, was instrumental in establishing the use of this procedure in Los Angeles. Judge Wapner served as an ex officio member of the Short Cause Personal Injury Committee, composed of representatives of the Los Angeles County Bar Association, the Plaintiffs' Bar Association and the Defendants'

²⁴ Arbitration: The Philadelphia Story, JOURNAL OF AMERICAN INSURANCE, September/October, 1969, p. 2.

Bar Association, along with three judges of the Los Angeles Superior Court. This Committee developed the procedural steps for this type of action. At the present time, the short cause personal injury action procedure is utilized only in simple personal injury cases.

The program....provides in essence that if counsel will stipulate that the case may be tried nonjury by one of three or more judges assigned to the civil trial pool in the Central District who are mutually acceptable to all parties, the Superior Court agrees that the case will be assigned to one of such judges.²⁵

On October 23, 1969, Judge Wapner appeared before this Commission in Los Angeles to discuss this program:

....the program envisions the initialing of doctor bills, hospital bills, in advance of the trial; initialing hospital records in advance of the trial, reports from employers as to loss of wages in advance, so it obviates the calling of witnesses, paying fees to doctors to come and testify; it saves the court time in waiting for doctors to come to court because doctors are very busy, they are trying to heal the sick, they have to operate and what have you, and it isn't always easy for them to come to court at an appointed time.

So we have found that what would be a three to four-day jury case a judge can try the same case in two or two and one-half hours. You can see the obvious saving there in judge's time. He can try maybe five to six cases, that is, nonjury trials, in the time it takes to try one jury case.²⁶

There is not yet enough data available concerning the impact the use of this short cause personal injury procedure has had on the backlog situation in Los Angeles County Superior Court. However, the Commission finds that this idea has a great deal of merit and therefore urges its adoption in any Superior Court in California faced with a serious civil case backlog.

²⁵ See Press Release of the Presiding Judge, The Superior Court, Los Angeles County, March 20, 1969.

²⁶ See Hearing of the Governor's Automobile Accident Study Commission, October 23, 1969, pp. 5-6.

FALSE OR FRAUDULENT CLAIMS

The Commission found, during the course of its hearings, that in spite of the fact that sanctions are presently employed against those who intentionally make fraudulent personal injury or property damage claims, still there was widespread concern regarding these practices and the effect such spurious claims have on the cost of automobile insurance.

Unfortunately, there are a small number of persons who look upon the personal injury reparation system as a means of making easy money. Although the number of false or fraudulent claims made annually is small in comparison to the total number of claims, they do constitute a serious threat to the integrity of the legal system. The money they take from the system is taken at the expense of the premium paying public and those whose personal injury claims are valid.

The only significant means which can be employed to combat the filing of false and fraudulent claims is to provide strict penalties for those who engage in this practice. It is proposed that where local laws are not adequate to cope with this problem, strong legislative measures be enacted.²⁷

This Commission does recognize that false or fraudulent claims are made under the present tort liability system and, as a means of discouraging such claims, recommends that strict sanctions should be imposed upon those who intentionally make claims for personal injury or property damage known by them to be false or fraudulent and upon those who assist in the making of such claims with knowledge of their false or fraudulent character.

 DIRECT CONTACT SOLICITATION

The Commission determined that while existing law prohibits the solicitation of plaintiffs' personal injury cases by attorneys, it does not cover

²⁷ Responsible Reform: A Special Report by The Defense Research Institute, Inc., Volume 1969, Number 8, p. 26.

the solicitation of the "investigation" of plaintiffs' personal injury cases by "investigators," licensed or otherwise. This deficiency has led to circumvention of the anti-ambulance chasing laws and the channeling of these cases into the hands of certain unscrupulous attorneys. It appears that here is a loophole that should and could be plugged. Obviously, if injured persons were not solicited immediately following the accident and "sold" on the idea of an investigator, who usually in the same interview "recommends" an attorney, there might be an opportunity provided for claims departments to effect amicable out-of-court settlements. This should reduce the cost of these claims to the carrier, provide for more expeditious settlements and reduce court litigation and bring an end to a vicious racket. This Commission therefore recommends legislation to prohibit direct contact solicitation in automobile accident cases by investigators, licensed or otherwise.

CONTINGENT FEES

Canon 13 of the Canons of Professional Ethics of the American Bar Association states:

A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of the court, as to its reasonableness.

This Commission has considered the question of misunderstandings and abuses surrounding the contingency fee practice in this State. While undoubtedly some abuses do exist, it must be admitted that the contingency fee system has permitted individuals with legitimate damage claims to pursue those claims through litigation when, because of inability to pay

for legal services, they might not otherwise be able to pursue the claim. The Commission finds therefore that the contingency fee system does have some social merit. The system as practiced in California is the same as that which is widely practiced throughout the United States.

A contingent fee has been defined as "...a fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyers efforts....if no recovery is obtained the lawyer is not entitled to a fee,"²⁸

The Commission does find that, based on the statement of policy embodied in Canon 13 of the Canons of Professional Ethics, there exists adequate structure for developing a court-administered plan to regulate contingent fees. It is possible that such a plan could be developed under the direction of the Judicial Council or the Supreme Court of California.

The Commission has also found that the proposal for the regulation of contingent fees advanced by the Defense Research Institute, Inc., does have merit. The Defense Research Institute, Inc., plan is a five-point program under which:

1. The amount of any contingent fee should be strictly regulated by appropriate local court rule or legislation.
2. Every retainer on a contingent basis should be in writing in a fixed format and should be signed by the client.
3. A retainer statement should be filed with the appropriate judicial authority by a retained attorney within a fixed number of days from the date of the written contingent fee retainer.
4. There should be strict control of the division of fees between attorneys, based only upon work performed.

²⁸ MacKinnon, Contingent Fees for Legal Services, 1964, p. 3.

5. Upon completion of the claim or suit an attorney should file an itemized closing statement with the proper judicial authority and a copy thereof must be delivered to the client.²⁹

While the Commission finds that this plan has merit, any such plan developed in California should be tailored to the special character of California's tort liability system.

²⁹ Responsible Reform: A Special Report by The Defense Research Institute, Inc., Volume 1969, Number 8, p. 18.

C. AUTOMOBILE ACCIDENT PREVENTION

RESEARCH COORDINATING COUNCIL AND CENTER

As the hearings held by this Commission progressed, it became apparent that a great deal was being done in California in the field of traffic safety. A number of worthy and useful projects had been completed or were currently under way. A great deal of money is being allocated to such projects by the State and Federal governments. In this State alone, approximately \$348 million dollars is spent annually on traffic safety related matters. Also apparent, however, was the lack of coordination between the entities involved in traffic safety research and related projects. It has been estimated that we have "2,400 kind of semi-autonomous entities involved in traffic safety in California...."³⁰ The testimony which the Commission heard from Mr. Bamford Frankland, State Traffic Safety Coordinator in the Office of Traffic Safety in California, indicated the need for a centralized, adequately funded agency with authority and responsibility to develop a management information system which would integrate the fragmented efforts of those entities engaged in traffic safety work:

Our priorities lie pretty generally in California in three broadly generalized areas. We are concerned, number one, with the reduction of fatalities and injuries, so we are investing a portion of our money, hopefully, in projects which will have a relatively quick and short-term payoff. We are trying to achieve a balance, however, by investing another portion of our money in improving our data base; the traffic records, the identification and surveillance of high accident locations, our inventories of traffic control devices and similar kinds of things. We feel it's absolutely essential to get a better picture of traffic safety in California than we have in our -- the way we have collected statistics have been fine for some individual agencies, but they don't allow the Governor or a program manager, such as myself, who is concerned with the broad picture of traffic safety, they don't allow us to really evaluate what's going on in

³⁰ See Hearing of the Governor's Automobile Accident Study Commission, May 28, 1970, pp. 7-8.

California and whether or not we are -- we have an effective traffic safety program. So we are concerned strongly with the improvement of our data base and we are investing a significant proportion of our money in that aspect of it. We feel that, in the third major area of our concern, the only long-range hope for reaching the goal that we want to reach and, hopefully, one of these days we can see the elimination of the accident as a cause of death. We are keeping our eye fixed on that, on the far horizon, as an ultimate goal to be working toward and we feel that we can reach that goal only if we can fundamentally change the attitudes and the skill levels of the drivers....³¹

This Commission agrees with Mr. Frankland's evaluation of the need for more meaningful information on the various aspects of traffic safety. The gathering of statistical data should not and must not become an end in itself. It is important that the traffic safety program manager have a logical system for interpreting the statistical data, as well as a logical system for collecting it. Logical interpretation of all pertinent data is crucial for making sound management decisions regarding proposed traffic safety programs as well as for evaluating the effectiveness of such programs once adopted.

There are two principal defects in traffic accident statistics. First, the published figures often do not mean anything. They may be superficial, obscure or too complicated to be of value. For instance, several hundred city traffic units and 17 state traffic agencies in the United States collect, on a continuing basis, statistics relating to vision obscurement noted in accident investigations. The presence of trees, signboards, buildings, etc., is often recorded without regard to their contribution to the accident. They also diligently summarize, year after year figures on race, sex, age, and occupation of the drivers. This kind of information is trivial and unimportant (in the usual summary form) to the collecting agency. This type of information is occasionally used to "prove" relationships or conditions already known with accuracy sufficient for all practical purposes.

³¹ Ibid., pp. 11-12.

Secondly, some figures do not tell the whole truth. Causal factors, not obvious to the non-expert reader, that should be to the competent statistician are not mentioned. The most common example of this abuse occurs in connection with fatality rates. Rates will often drop and safety officials will quickly claim credit for their schemes. Entirely ignored will be changes in the environment unrelated to the safety program. The development of new drugs such as the antibiotics, improvements in communications, new surgical and medical techniques, weather, and plain chance are just a few of the important factors for which allowances must be made.³²

This lack of conclusiveness of much of the data gathered by traffic safety entities highlights the oft-found lack of communications either horizontally or vertically. As we stated in our Interim Report to the Governor and the Legislature, January, 1969, "It appears that more effective results could be obtained if a clearing house could be established that would coordinate various independent efforts without placing any restrictions on programs of research and administration aimed at automobile accident prevention. Any legislative program adopted will only be as effective as the staff and budget provided by the Legislature for the administration of such a program."³³

The Commission therefore recommends that a Research Coordinating Council and Center be created within the Business and Transportation Agency, Office of Traffic Safety, with the authority and responsibility to develop and implement a management information system which will furnish information to and secure information from all research entities dealing in traffic safety and traffic medicine. The establishment of such a Center with its

³² See A Case for De-Specialization of Traffic Operations, by Captain Palmer Stinson, Oakland, California Police Department, in The Journal of Criminal Law, Criminology and Police Science, Vol. 51, No. 5, 1961, p. 563.

³³ See Interim Report to the Governor and the Legislature of the Governor's Automobile Accident Study Commission, January, 1969, pp. 8-9.

advanced management information system will insure that the maximum value will be realized from the Federal and State monies and individual efforts put into traffic safety programs annually.

DRIVER EDUCATION

In California, the responsibility for driver licensing and control is vested in the Division of Drivers Licenses in the Department of Motor Vehicles. The Division is responsible for promoting highway safety by insuring that all drivers are identified, have demonstrated that they have the physical and mental ability to drive safely, that they have adequate knowledge of the laws relating to safe driving, that they have adequate skill and proper control of a motor vehicle, and by insuring that the drivers have maintained physical and mental capabilities and have accepted their responsibilities in properly and safely using the highways.³⁴ It should be pointed out that this charter addresses only the question of testing, not of training.

The Division of Drivers Licenses does have some training responsibility in the area of post-licensing control, e.g., in the negligent operator program. Vehicle Code Section 12810 defines a negligent operator as a person who has had four or more convictions of moving violations in 12 months, six or more in 24 months, or eight or more in 36 months. The Department of Motor Vehicles has a certain amount of discretion in dealing with the negligent operator. He may be merely reprimanded; he may be placed on probation; or his license may be suspended. However, in the last several

³⁴ See Hearing of the Governor's Automobile Accident Study Commission, August 8, 1968, p. 41.

years, many negligent operators have been referred to traffic violators school. The California courts have cooperated with the Department of Motor Vehicles in the development of this program.

The point to be made in this description of the Department of Motor Vehicles' education and training role is that it is in no way tied to the licensing process. The Department does have some authority to impose training on a driver, but only after the driver has qualified as a negligent operator.

....I feel rather strongly that we have to move licensing and education much closer together than we have been and I believe this on the fact that we screen a driver and it's a pretty serious decision to make to keep him off the highway, to not license him, and I think that as a service to the motoring public and as a need, we have some degree of concern that perhaps training programs could be put into motion to bring people up to an acceptable level. And as it is now, licensing and education are pretty much in a different world. We screen the driver and we make a decision on licensing him or not. And I think if there is more of an interlock between this process, then we might see some -- in other words, they sort of earn their license as part of their educational process. Even -- I'm not talking merely about the teenager; I'm talking about people who need upgrading of their training, abilities to drive on modern freeways and other driving, I think, driving information that they need to know.³⁵

This Commission endorses the concept of a broader scope of driver education in the public schools. The expansion of the driver education curriculum, in terms of course content and the relationship this revised program should have to the licensing responsibilities of the Department of Motor Vehicles, Division of Drivers Licenses, is properly the subject of a joint effort among the Department of Motor Vehicles, the State Board of Education and the recommended Research Coordinating Council and Center in the Office of Traffic Safety.

³⁵ See Hearing of the Governor's Automobile Accident Study Commission, Testimony of Mr. Ronald S. Coppin, Chief, Research and Statistics, Department of Motor Vehicles, June 25, 1970, pp. 59-60.

There appear also to be inconsistencies in the methods of maintaining the standards presently provided by statute for driver education in the public schools. Such lack of consistency in applying the minimum standard often results in misleading information as to the effectiveness of the entire program.

We know in many, many instances that we have real fine programs, real competent teachers, real competent instruction, but their product is measured along with the product of a course that may be quite substandard. It may be put on by a person who hasn't any particular interest in the subject. The school needs to provide this instruction, so they say to the coach, "Well, look, we will up the salary a little bit if you will take an hour or two of driver training a day in addition to your coaching assignments," and consequently the end product of that type of course pulls down the overall average of the better schools.³⁶

A program to evaluate the effectiveness of the present system of driver education through the public schools should be undertaken prior to any major changes in the present system.

Further study should be made to determine the effectiveness of the present driver instruction conducted by the secondary school system, and through an audit system that is accepted by the school districts, or the Department's closer relationship to the school districts, we should think this could be accomplished.³⁷

The Commission therefore recommends that a uniform standard for the teaching of driver education in the public schools in the State of California be developed for those persons between the ages of 15 and 18; the Department of Education should be encouraged and given support to take such steps as necessary in bringing about the improvements needed, including education in defensive driving and emergency driving methods.

³⁶ See Hearing of the Governor's Automobile Accident Study Commission, Testimony of Mr. E. K. Ball, Chief, Division of Drivers Licenses, Department of Motor Vehicles, August 8, 1968, pp. 38-39.

³⁷ Ibid., p. 39.

The quality of instruction received is directly related to the competence of the instructor and the interest the instructor exhibits toward both subject matter and student. One step necessary to upgrading the quality of driver education instruction in California is remove driver instructor qualification from the category of vocational instructor. Section 18252.2 of the California Education Code should be amended to read: "A qualified instructor is one who holds a single subject credential or who holds a valid prior credential authorizing instruction in automobile driver education and driver training."

There should, at the same time, be a corresponding increase in emphasis by the educators on the importance of sound driver education. The Commission therefore recommends that driver education be made a required subject equivalent to a full school semester and given equal emphasis with other single subjects.

Along with upgrading the quality of driver education instructors and an expanded driver education program, new ideas and new approaches to driver training should be developed. The Commission recommends that a multiphase approach to driver training be developed, incorporating either simulator or driving range experience in addition to on-street driving experience. Also, a driver education textbook should be developed for the public school system under the joint supervision of the Department of Motor Vehicles and the recommended Research Coordinating Council and Center.

The Commission recognizes the significant contribution made to the California driver education program by the commercial driving schools and encourages their further development. However, the Department of Motor Vehicles should require the commercial driving schools to meet the same standards as those required of the public schools.

DRINKING DRIVERS

Perhaps the most serious problem facing those concerned with automobile accident prevention is the problem of alcoholism and drugs and the role they play in causing automobile accidents.

Number one, more than one half of the drivers killed in traffic accidents in California have been drinking. Of the drinkers killed, close to 80% have been drinking heavily enough to make one suspect chronic alcoholism or serious problem drinking. There are a great many studies that reflect the drinking driver as the greatest single factor in fatal accidents.³⁸

The drinking driver problem poses enormous difficulties for law enforcement, the judiciary and those charged with attacking and correcting this serious problem. At the present time, the California Vehicle Code makes no classification of drinking drivers. The chronic alcoholic and the occasional social drinker are treated alike. Yet if 80% of the drinking drivers killed have been drinking heavily enough to make one suspect chronic alcoholism, it becomes obvious that lumping all drinking drivers into one general category of offender and treating them similarly may not be the wisest approach to the problem. This Commission recommends that a carefully considered scheme of classification of the drinking driver be developed and the system of dealing with the different classifications of drinking driver be responsive to the problems of the individual category.

A typical classification might be, (1) drinking drivers who are skillful drivers, but whose basic problem is chronic compulsive sociopathic drinking, (2) drinking drivers to whom alcohol is not a compulsive problem, but whose basic problem is aggressive sociopathic driving, (3) drinking drivers to whom neither drinking nor driving is usually a problem but who occasionally drink too much. On occasions, such drivers drive with blood alcohol concentration which is too high, (4) drinking drivers who are unusually sensitive to alcohol,

³⁸ See Hearing of the Governor's Automobile Accident Study Commission, Testimony of Mr. Royal A. Neilson, Assistant Managing Director, California Traffic Safety Foundation, September 11, 1968, p. 4.

(5) drinking drivers who have only recently started driving and for whom driving has not yet become a learned skill. Even small amounts of alcohol may have drastic effects on their driving behavior, (6) drinking drivers whose basic driving skill has deteriorated due to age or illness thus increasing the effect of alcohol in their behavior, (7) drinking drivers to whom neither drinking nor driving is a problem. When they drink, amounts are always minimal and blood alcohol concentrations are always at a subthreshold concentration.³⁹

Such a classification system as this one could serve as the basis for the development of customized approaches to handling the driver who has been drinking in terms of which particular category he falls. This more sophisticated approach to the problem could be an invaluable aid to judges forced to deal with offenders who, under present statutes, face suspension of license as well as fine and/or imprisonment. Judges are often frustrated by the realization that these traditional sanctions available to them do not deter the drinking driver. An individual who must use his automobile to transport himself to his place of employment often will not stop driving after his license has been suspended by the judge, thus leaving himself vulnerable to a new and serious charge of driving with a revoked license. Some judges, recognizing this dilemma, will not consider an offender's prior conviction for drunk driving if doing so will eliminate judicial discretion not to order license revocation. The burden is then on the Department of Motor Vehicles to discover that the driver has a prior record of conviction for drunk driving and the Department must then take the necessary steps to order the license revoked.

Such manipulation of the sanction requirements certainly does not make for a uniform application of justice and does not generate respect for the administration of the laws of California.

³⁹ See Borkenstein: A Typical Classification of the Drinking Driver, presented to the Third International Symposium on Traffic Medicine, New York City, 1969.

The Commission recommends that a schedule of mandatory fines and/or imprisonment for first offenses for drunk driving be developed. Such a schedule could be developed concurrently with the development of a system of classifying the drinking driver, the sanction schedule thus being inter-related with the classification system.

The Commission also recommends that all persons convicted on a second offense for drunk driving be referred to a medical advisory board for examination and rehabilitation. Such a medical panel could make a professional determination as to which classification category the offender falls into, and then deal with the offender accordingly.

Priorities can be established and counter-measures applied. These factors might be first, blood alcohol concentration in excessive threshold values in any driver. This is the only criteria upon which the police can act other than dangerous alcohol incited behavior. The police cannot be social workers and make social worker decisions. Two, active alcoholism. This is a component that involves the physician in psychiatry. For this group, punishment is likely to fail. Only therapy can rehabilitate drivers manifesting this factor. Three, sociopathic driving aggravated by alcohol. While this is a psychiatric problem, it falls outside the domain of our current discussion since it is driving not drinking that is the problem. Four, uncontrolled social drinking. Possibly a fear of strict enforcement is the most effective deterrent for this particular group of drivers. Five, lack of driving experience or skill aggravated by alcohol. Possibly the most effective counter-measure for this group is through the dissemination of information in driver education pointing out the danger at this juncture of driving experience. Punitive enforcement may be effective as a counter-measure when directed at the normal, not compulsive drinker.⁴⁰

The medical advisory board could be composed of physicians and psychiatrists from the county and their authority would be backed by the power of the court. The court ordering the medical examination would have the authority to enforce compliance with this probation program by imposing

⁴⁰ Ibid., pp. 1-2.

a jail sentence for noncompliance. The implementation of this recommendation could be accomplished through a joint effort of the medical profession, the Judicial Council and the Department of Motor Vehicles.

The very serious problem of the drinking driver is recognized at all levels of government. The State of California has recently established the Office of Alcohol Program Management. The Commission enthusiastically endorses this action and urges that this agency should be adequately funded and staffed to accomplish its objectives. The Office of Alcohol Program Management was established at the prompting of the National Highway Safety Bureau which is currently implementing its new alcohol safety countermeasures program. This program is essentially a federal grant program designed to encourage research and projects at the local level, in cities, metropolitan areas, and counties, focusing on law enforcement, traffic courts, special driver counseling and assistance efforts, and public information.

The concept of the NHTSB comprehensive countermeasures program then is to initiate action in a number of areas designed to: (1) increase the percentage of problem drinkers who are identified either to the courts or licensing agency; (2) assure that decisions are made regarding the most appropriate procedures to reduce their drinking problem and to assure that they do not drink and drive; and (3) assure a follow-up action program to carry out these decisions.⁴¹

The Commission whole-heartedly endorses this program and strongly urges that the State of California prepare to take maximum advantage of the availability of these funds to attack this very major problem.

DRIVER LICENSING

As mentioned in our discussion of driver education, the Department of

⁴¹ See Alcohol Safety Action Projects: A Guide for Applicants, U. S. Department of Transportation, National Highway Safety Bureau, August 7, 1970, p. 15.

Motor Vehicles, Division of Drivers Licenses, is charged with the responsibility of testing drivers' license applicants and issuing drivers' licenses on the basis of these tests. The authority for this activity rests in the Vehicle Code under Division 6 and 7, Chapters 2, 3, and 4.

Although several advances and improvements have been made in methods and procedures, especially in post-licensing control as previously indicated the Commission recognizes the need for more extensive research into today's driver and the driving environment to insure that the standards and procedures employed by the Division of Drivers Licenses for testing are consistent with the technological, psychological, and environmental conditions that face today's driver.⁴² However, the Department's role, by present statute, is primarily that of testing and screening and not of training. Even though certain educational materials are prepared and distributed by the Department, their basic responsibility is one of identifying drivers who have demonstrated ability to operate a motor vehicle safely. Once a license has been issued, only a driver's traffic convictions and/or accident record will bring a negligent operator's driving habits to the attention of the Department again. In cases where the individual is identified as being unwilling (negligent operator) or unable (physical or mental cases) to comply with safe driving rules, statutory administrative actions, e.g., withdrawal of driving privilege through suspension or revocation of the driver's license; or compulsory attendance in a Driver Improvement and Control Program, can be carried out. The Commission finds this to be an after-the-fact approach to driver safety. Mr. R. V. Patton, a Commission member, summarized this current difficulty in terms of the State's skills in examining potential drivers:

⁴² See Hearing of the Governor's Automobile Accident Study Commission, Testimony of Mr. E. K. Ball, Chief, Division of Drivers Licenses, Department of Motor Vehicles, August 8, 1968, pp. 50-53.

Our difficulty at the present time in the driver licensing area seems to me that at the time of the granting of the license, we're only measuring the individual's knowledge of the law and some very basic driving skills, where we've got to find some means of determining whether or not he has the skills to cope with the type of situations he's going to be faced with. And it would seem to me that our skills in this area are largely unexplored.⁴³

The Commission heard various other testimonies that support this contention and identify a key manifestation of the problem; that a large percentage of traffic violations represent a lack of in-depth knowledge of the rules of the road and good driving practices.⁴⁴ At the same time, adequate measures are not being taken to identify potential violators or high risk drivers (other than possibly age or physical ability). The consensus of these testimonies indicates that a possible short-run solution to many aspects of the competent driver problem would lie in driver education, (e.g., driver education programs presently given in many high schools and colleges as well as private driving schools) as well as a variety of other types of post-licensing driver oriented programs (e.g., a driver improvement program for the elderly). Section 18255 of the Education Code directly supports the testimony of these individuals:

....Only through a high quality program of driver instruction can the greatest potential in traffic accident prevention be realized. Further, the State has a responsibility to share in the reasonable cost of providing such courses.

The Commission also recognizes that the research program of the Department of Motor Vehicles should be expanded. In his testimony before the

⁴³ See Hearing of the Governor's Automobile Accident Study Commission, June 25, 1970, p. 67.

⁴⁴ See Hearings of the Governor's Automobile Accident Study Commission, Testimony of Mr. F. K. Ball, Chief, Division of Drivers Licenses, Department of Motor Vehicles, August 8, 1968; Testimonies of Mr. Robert Terry, Department of Education, and Mr. Gene Halliburton, General Manager, National Automobile Club, November 7, 1968.

Commission, Mr. Ronald G. Coppin, Chief of Research and Statistics, the Department of Motor Vehicles, outlined the goals of the current Department of Motor Vehicles' research program and the need for further research:

The goals of our program....are really to measure the effectiveness of the various programs in the department....safety as well as administrative....and to develop and measure the effectiveness of alternative programs.(Our research) it suggests that.... departments and agencies....move toward development of programs that produce results. I think this can be done only through scientific efforts which validly weigh the program cost versus the program benefits, benefits not only to those involved in the program and affected by the program, but benefits when all California drivers are considered.⁴⁵

Mr. Coppin's sentiments are supported by Mr. Gene Halliburton, General Manager, National Automobile Club, who in his testimony before the Commission, November 7, 1968, cited a need for specific research in the motivations of the motorist:

I think we need some fresh thinking and perhaps more insight into the psychological aspect of the problem of driver motivation. How do we get to people? We have to cause drivers to identify with our traffic safety and to really become involved in this thing, rather, than as many of them are, if not most of them are, simply bystanders feeling yes, that's right, but it (the message of traffic safety and accident prevention) applies to the other driver and not to me.⁴⁶

It is clear from these testimonies and the evidence placed before the Commission that there exists no single answer to the problem of driver licensing and control. It is equally clear that further driver education and driver research will insure that the licensing process is qualified to limit the issuance of licenses to only those citizens who meet stringent criteria. The manner of testing driver license applicants should therefore

⁴⁵ See Hearing of the Governor's Automobile Accident Study Commission, June 25, 1970, pp. 43-44.

⁴⁶ See Hearing of the Governor's Automobile Accident Study Commission, November 7, 1968, p. 52.

be the object of constant scrutiny and search for improved methodology. At the same time, the necessary techniques for the identification and control of high risk drivers should be further researched and implemented through the licensing process. Visual requirements and road tests should also be periodically evaluated and revised as part of a regular program to improve the licensing process.

HIGHWAY SAFETY PROJECTS

In testimony before the Commission, Mr. Bamford Frankland, Traffic Safety Coordinator, Business and Transportation Agency, described a number of highway safety research projects that are presently underway in California as well as several which are planned for the future. The Commission views these efforts with a great deal of interest and strongly urges that the State of California and the agencies having responsibility for traffic safety continue this experimentation.

As discussed earlier, the State and Federal governments are currently conducting a sustained drive against the drinking driver. "If we could find a solution as to the alcohol program, we could cut our deaths by, I think, 50% in California."⁴⁷ In a research project in San Diego, four squads of the San Diego Police Department have been specifically trained in drunk-driving identification techniques. We have previously cited the position of the Commission that a comprehensive and coordinated approach to the problem of the drinking driver could materially reduce the impact this class of driver has on automobile accident statistics in California.

⁴⁷ See Hearing of the Governor's Automobile Accident Study Commission, May 28, 1970, p. 17.

A number of projects are currently underway in California communities which deal with the improving of traffic records, the identification and surveillance of high accident locations, and the development of plans to improve traffic control devices, the pavement striping and signals. In another project the San Diego School District has developed a creative and innovative approach to driver education that has motivated students to assimilate what is being taught.

Experiments are likewise underway which are designed to help reduce the tremendous human and economic losses from automobile accidents. In Los Angeles, the 42-mile loop project is an attempt to deal with the problem of response time for emergency services. The project makes use of traffic flow detectors, a computer center, a helicopter and closed circuit television to provide instantaneous information to a traffic controller. This information allows the traffic controller to prevent minor problems from becoming major problems, and to respond quickly to any emergency situation.

The Commission also recommends that the cities and counties be encouraged, if not required, to adopt in their highway engineering the standards now governing the Department of Public Works, Division of Highways. In his testimony before the Commission, Mr. G. L. Russell noted that the geometric design of a highway and the traffic control devices placed on or alongside the highway contribute to the accident rate of that highway. "When you stop to realize that less than 50% of the motorists involved in a fatal collision is guilty of any infraction or violation of the Vehicle Code or rules of the road other than perhaps momentary inattention, death or serious injury is a terrible consequence,"⁴⁸

⁴⁸ See Hearing of the Governor's Automobile Accident Study Commission, August 8, 1968, p. 4.

The fatality rate has dropped much sharper on the state highway system than it has on the rural highway, city street and rural road system. The breakaway sign programs, the guardrail programs, the median barrier programs, and the programs to remove or protect hazardous fixed objects are very high payoff programs for highway safety. However, at the city and county level, there are an extremely large number of accident hazards still on the roadways. Unfortunately, the State of California has no fiscal, legal or other jurisdiction or authority to require compliance with minimum standards. However, the Commission does recommend that the cities and the counties voluntarily adopt those standards presently governing the Department of Public Works, Division of Highways.

For those who may be interested in more information concerning the nature of the highway safety related projects currently underway in California, a digest of these projects may be found in Volume III of this report.

MOTORCYCLISTS

The Commission has noted that two recent attempts to pass legislation which would strengthen safety requirements for motorcyclists have failed to pass the Legislature, primarily as a result of lobbying by groups opposed to such legislation. The National Highway Safety Standards for motorcyclists provide:

I. The program shall provide as a minimum that:

A. Each person who operates a motorcycle:

1. Passes an examination or re-examination designed especially for motorcycle operation.
2. Holds a license issued specifically for motorcycle use or a regular license endorsed for such purpose.

- B. Each motorcycle operator wears an approved safety helmet and eye protection when he is operating his vehicle on streets and highways.
 - C. Each motorcycle passenger wears an approved safety helmet and is provided with a seat and foot rest.
 - D. Each motorcycle is equipped with a rear-view mirror.
 - E. Each motorcycle is inspected at the time it is initially registered and at least annually thereafter or in accordance with the state's inspection requirements.
- II. The program shall be periodically evaluated by the State for its effectiveness in terms of reductions in accidents and their end results and the National Highway Safety Bureau shall be provided with an evaluation summary.

The Commission endorses the concepts embodied in this standard and especially urges that legislation be enacted to comply with the Federal Standards in the area of helmets and eye protection for the motorcyclist.

COLLISION DAMAGE SPECIFICATIONS

The Commission recognized that a major component of today's high costs of automobile insurance is the soaring expense of repairs to damaged motor vehicles. The Commission has heard testimony to the effect that, nationally, damage in excess of four billion dollars per year is caused to motor vehicles in low-speed crashes (five and ten miles per hour). An estimated 350 million dollars annually is spent on bumper replacement alone.⁴⁹

Testimony concerning the high cost of low-speed crash repair was heard primarily from Mr. Donald L. Schaffer, Vice President and General Attorney, Allstate Insurance Company, and from Dr. William Haddon, Jr., President, Insurance Institute for Highway Safety. The testimony of these individuals

⁴⁹ See Hearing of the Governor's Automobile Accident Study Commission, Testimony of Mr. Donald L. Schaffer, Vice President and General Attorney, Allstate Insurance Company, January 22, 1970, p. 5.

pointed up what this Commission finds is an area in need of, but presently void of regulation; namely, in the relationship of design and construction of the motor vehicle to the cost of repair to the motor vehicle.

Under the present Federal Motor Vehicle Safety Act, the Federal Government may prescribe standards for vehicle design and construction.

But the vehicle standards relate only to...bodily injury...injuries to persons. And the governmental authority would appear not to extend to the prescription of standards to reduce damage to vehicles from the standpoint of economic loss unless it also directly relates to injuries to occupants, pedestrians, or other persons in the community. So we have a situation where there are not...Federal standards in regard to vehicle construction as they relate to repairability, to crashability, to cost of repairs from the standpoint of trying to design a vehicle that is most economical for the public if it is involved in crashes. And we're particularly interested here in low-speed crashes of the type that don't involve personal injuries; the type that would normally not involve the occupants of the car in any injuries.⁵⁰

Since state regulations of vehicle design and construction as they relate to cost of repair have not been pre-empted by Federal legislation in the field, this Commission feels that the California Legislature has an obligation to afford this problem careful scrutiny. This Commission agrees with the testimony of Dr. Maddon that the state-of-the-art of design and construction of "damage-proof" vehicles (in low-speed crashes) is presently capable of meeting reasonable minimum standards.

You have particularly well illustrated by the California Aerospace industry numerous examples of ways of slowing down structure and people gently without doing any damage to structure. For example, in aircraft landing struts which come down at speeds approaching about ten miles an hour...in normal landings...without any damage to structure.⁵¹

⁵⁰ Ibid., p. 4.

⁵¹ Ibid., Testimony of Dr. William Maddon, Jr., President, Insurance Institute for Highway Safety, p. 17.

In the aircraft industry, if one designed light aircraft or even heavy aircraft so that every time they landed, every time they bumped, one had to spend a lot of money to repair a structure, the product would be unsaleable. And yet the public, because it has not known that such design is completely unnecessary in the case of the automobile, is literally being taxed both in having to pay for the unnecessarily expensively constructed and designed front and rear ends in particular vehicles on initial purchase, but also has to pay, often many times over during the life of the car, for the repair of the same unnecessarily expensive and delicate structure.⁵²

The Commission finds that by adopting the reasonable minimum standards which it recommends, to be implemented over a reasonable period of time, the Legislature will reduce for the California motorist the high cost of delicate vehicle design and construction.

The Commission recommends therefore that automobile manufacturers be required to market motor vehicles that can withstand motor vehicle damage of speeds up to fifteen miles per hour: that no later than January 1, 1972, such vehicles be able to withstand damage of five mile per hour front-end and rear-end collisions; that no later than January 1, 1973, such vehicles be able to withstand damage of ten mile per hour front-end and rear-end collisions; and that no later than January 1, 1974, such vehicles withstand any collision damage at fifteen miles per hour; that the State should be authorized to seek injunctive relief restraining the sale of vehicles in instances in which the manufacturers of vehicles being sold in the state have not met collision damage specifications required by law.

⁵² Ibid., pp. 17-18.

CONCLUSION

The task of recommending solutions for the prevention of automobile accidents, effective disposition of their consequences, and adequate and timely reparations to accident victims is a difficult but challenging one. The opinions and statistical data advanced in support of or in opposition to proposed courses of action was massive and often conflicting. The Commission, in two and one-half years, has attempted to sift out those problem areas which are most significant. It has concentrated on these areas in order to develop recommendations which would have the broadest impact.

The Commission could very well have spent its entire life addressing the problem of the tort liability system and the new concepts which have been advanced to change or improve that system. Likewise, the entire two and one-half years could have been spent dealing with the problem of the drinking driver. The Commission's scope was broader than this, however.

A cross section of skills rather than a concentration of one kind of skill was brought to the Commission by the members. Such a diverse composition of membership enabled the members to make a dispassionate examination of a number of the major problems relating to automobile accidents.

The recommendations of the Commission encompass the major areas related to automobile accidents. These recommendations, taken one by one, might not mitigate the difficult problems discussed herein. However, taken together, the Commission believes that these recommendations offer a sound foundation for important improvements in traffic safety in California in the nineteen seventies. Accordingly, the Commission respectfully urges careful consideration of these recommendations by the Governor and the Legislature.

Mr. Moss. Thank you. As you probably know, we had the president of the American Association of Trial Lawyers as a witness before the committee.

Mr. DEACY. That is the American Trial Lawyers Association and this is an entirely different group.

Mr. Moss. Well, at this time, I am going to ask the gentleman from Texas, Mr. Eckhardt, to take the chair because it is necessary I leave to keep an appointment made some time ago. I do want to express my appreciation to you gentlemen for appearing here and giving the committee the benefit of your views and I assure you that the material submitted will be carefully studied by us.

Mr. DEACY. Thank you, Mr. Chairman.

Mr. WARE. I might note my departure is not related in any way to the presence of these four gentlemen or to the new presiding officer.

Mr. DEACY. We accept that.

Mr. ECKHARDT (presiding). I, too, would like to commend your group, largely for the dichotomy of your positions.

I think it is very becoming of lawyers to maintain such a difference of positions, if not of opinion.

I will defer my questioning at this time to you, Mr. McCollister.

Mr. MCCOLLISTER. No questions, Mr. Chairman.

Mr. ECKHARDT. I have a few. First, Mr. Davidson, I enjoyed your testimony and agreed pretty largely with it, but on one point I would like to ask you this. It seems to me that the measure of justice or injustice is not so much the difference between what one gets if he has a lawyer or does not have a lawyer, but rather how far one who is insured falls below being made whole again. You had referred to the lawyer or no-lawyer situation as evidence of a contribution by the insurance company to the cost of the plaintiff's lawyer and I just have some question about it and would you care to comment?

Mr. DAVIDSON. I feel this experience has demonstrated, and I don't want to repeat what I said earlier, demonstrated that the injured person usually is unaware of what, shall I say, the market is as to what would be fair and just compensation to him under all of the circumstances of the occurrence, where we have the fault system and he very often is unable to properly evaluate his own injuries, he is not a doctor, and the lawyers usually, in working this field, through long experience, have some idea as to what the outlook is going to be and they know what is involved in getting people together in the way of experts, whether they are doctors or experts in other fields, so they are able to give him an informed opinion as to the risks involved to him and what his case really is worth and very often it has been our experience in our practice the lawyer may advise the client not to employ an attorney, to dispose of his case for what he can get on the theory it is the wise way to proceed and not get involved in litigation.

I think this is one of the problems about the prompt and advance payments being made by many of the insurance carriers, which is a very wonderful program, but unfortunately the injured person there, because of the good will built between him and the insurance company, they are treating him so well, will often settle the case at too modest an amount because he does not know what he honestly and fairly is

entitled to. I am not sure I am responding directly to your question and I would appreciate it if you would let me know if I am not.

Mr. ECKHARDT. I think you are. As a matter of fact, it leads to this question: Under H.R. 7514, we, in effect, purport to take a large body of the claims out of the tort liability field and place them in the field of "no-fault" insurance, leaving, of course, certain type of tort claims which are described as those above 70 percent disability and those which include dismemberment and certain other conditions within the tort field.

Now, within that area that we cover under "no-fault" liability, at least that the bill covers, there seems to me to remain a substantial factual question that might require a lawyer's attention, and that is the question of damages. It has been somewhat assumed, I think, by some of the authors of the bill that because the insurer is the insurer of the claimant, that therefore these damages will be paid without adjudication of the amount.

Of course, the bill goes up to \$36,000. That is a rather substantial recovery and it affords an area of considerable disagreement as to the amount of damages. The bill does not provide an administrative agency to make this determination and, as I read it, apparently it leaves the question to the courts. What is your feeling as to the role of the lawyer with respect to the question of representing clients as to these damages?

Mr. DAVIDSON. There will be no way to resolve these cases without lawyers on both sides. Many States will not permit an expert witness to express an opinion in this form that a disability equals 70 percent or 20 percent. Usually, he may be allowed to say this man has this limitation in the motion of his leg or back or arms or something of that kind, but they ordinarily will not let him give an ultimate opinion as to what the disability adds up to as to that human being, so there are questions, but he can introduce evidence as to what the bill sets out as a line of testing it.

When you seek to prove that kind of disability of a human being, I don't know how you ever reach that level. I have been in this work for 35 or 40 years and you can speak of lawyers and I know lawyers who are paralyzed from the waist down and I know some with both legs amputated who are able to practice, and some go to court and some work in their office and there are other professional people who can carry on and you would say ordinarily, at first blush, a man who has both legs or an arm and leg off, "isn't he 70 percent disabled," but he is not.

Mr. ECKHARDT. That would fall under this "dismemberment" exception in the bill.

Mr. DAVIDSON. It would not necessarily get him into that. That is disfigurement and it is not in the 70 percent category because he may not be, well, to carry on his occupation, which is on page 9, I think of the bill, let me see, yes, that is where you talk about right to proceed to recover for damages and in the catastrophic loss that appears somewhere.

Mr. ECKHARDT. The definition of "catastrophic loss" is on page 3 and includes "death, other accidental harm resulting in permanent and total disability or permanent and partial disability of 70 percent or more, or disfigurement, which is permanent, severe, and irreparable."

Mr. DAVIDSON. I wouldn't know under this bill whether or not, and we have read it a number of times since we had a chance to see the new draft, whether a court would say that this person is regarded as entitled to payment because he is more than 70 percent disabled.

You have a very strange situation.

Mr. ECKHARDT. He would certainly fall under Roman numeral XXX.

Mr. DAVIDSON. He has a disfigurement, which is permanent, severe, and irreparable.

Mr. ECKHARDT. If I may interrupt you, you are raising the point that you have the question of damages to be tried by some courts, an appropriate matter to employ a lawyer, and in addition you have jurisdiction threshold with respect to court liability to be determined somewhere, either in the State court, assuming the matter falls in the exceptional category, or possibly in a Federal court in connection with other contentions made in the Federal court under the "no-fault" liability provision.

Mr. DAVIDSON. You addressed yourself to something, if I may, with your permission, refer to, and under this provision a man who believes or his attorney believes, he is entitled to be protected under this major disability section, can bring his lawsuit and until he tries that case and finds out what the judge or jury decides, he doesn't know if he has a case, and you mentioned it was a threshold jurisdictional case.

Mr. ECKHARDT. He does not know if he has a tort case. If he brings it in the State court, I presume he would try it through on allegations he felt were within the tort exceptions and if he failed to meet those, I suppose he would have to go back under the "no-fault" and bring suit again.

Mr. DAVIDSON. The result, suppose there are special interrogatories and the jury might find that this man does not have 70 percent or more disability, then the conclusion is, he has no right to recover for negligence of the other driver, so then he has spun his wheels and gone through that for naught. Each time he brings in a flock of experts and finds out he cannot recover because he has not gotten 70 percent, suppose he has only 69 percent.

Mr. ECKHARDT. There may be another possibility and I would like any of the witnesses to comment on it. Perhaps a person can bring his action in Federal court on the basis of Federal question jurisdiction on the "no-fault" section, and also ask for a declaratory judgment with respect to whether he falls in this or the exception.

I again suppose he would first have to try his case in Federal court, getting such a declaration, and then refile in State courts or perhaps he could try it in the Federal court as pendent jurisdiction of the Federal court.

Mr. DAVIDSON. The point is, as I see it, you mentioned something you were discussing the other day, a great many of these cases may go to the Federal court and I know the Chief Justice is most anxious to move the automobile case out of the Federal system and I think this committee and the Congress may be giving him quite a present; he may get an awful lot of cases in the Federal court if this becomes the law of the land.

I think it is a Federal statute and there is a real question as to whether these cases may not be properly, as the Chairman pointed out, may not go into the Federal court, and I am not sure.

Mr. ECKHARDT. I would like to ask Judge Reardon a question somewhat related. Assuming we passed some kind of statute that provided some segment of the total area of damages as a result of automobile accidents under a no-fault system and I gather from your testimony you are not prepared to say finally that you are opposed to cutting out some area of this nature?

Judge REARDON. That is true.

Mr. ECKHARDT. If we did it, obviously, we would have an area of Federal jurisdiction and have to decide in some manner what courts and what procedure would be involved, because we would have several choices and they would be tried generally as Federal questions in the Federal courts or we can provide for concurrent jurisdiction in State and Federal courts, or we could provide means by which the Federal judge could shuck off some of the cases on a more or less discretionary ground or we can perhaps encourage the trial of the case by magistrates and would you care to comment on how this might most efficaciously be done if we did carve out some area of no-fault coverage?

Judge REARDON. Of course, you could do as you suggested, you could provide for it in the legislation itself. I presume under existing law that a Federal court would have the right to assume jurisdiction of the case even though it has been filed in a State court under existing law and I think they could because you certainly have a question of interstate commerce and a Federal statute which is certainly in question, and I think you can by legislation provide that both courts would have concurrent jurisdiction. I think you could provide that the case should be instituted in the State courts. I think you would have authority to do that.

Mr. ECKHARDT. I suppose you could negative the removal statute?

Judge REARDON. I think you could for the purposes of this statute negative the removal statute, yes, you could. I think you have an open field as to where you might place it.

Mr. BROYHILL. Would you explain to us nonlawyers what you are talking about?

Mr. ECKHARDT. As I understand it, ordinarily a case which arises under a Federal jurisdiction, can always be tried in Federal court if any party insists upon it. If it happens to be filed in the State court, it can be removed to Federal courts on the ground that Federal jurisdiction is involved.

Judge REARDON. I might interpolate it is the impression of State court judges that Federal courts are rather jealous of that prerogative.

Mr. ECKHARDT. I may say the removal statute can be pretty preemptory. Now, what would you think would be the best way to handle it? We do have a question of an overloading of the courts.

Judge REARDON. Quite frankly, Congressman Eckhardt, I think it would be a sad mistake to burden the Federal court with these matters. I think, and I know you are all acquainted with Justice Burger's position, which has been stated recently, the Federal courts are overloaded and I am confident in the near future there may be actions taken to transfer many of the automobile cases that are presently in the Federal court into the State system.

I am not sure we need any more, but certainly I think this might be a better way to handle the cases than to continue to handle them in the Federal courts, so I think my answer to your question would be it would be better for you to place these in the State courts.

Mr. ECKHARDT. But it would be possible and even efficacious, as you view it, for the cases to be left to the State courts or specifically designated to the State courts whether or not the action is by virtue of a Federal statute or by virtue of a State statute?

Judge REARDON. Yes.

Mr. ECKHARDT. There is one thing that troubles me a great deal in the testimony here and I would like to have you comment on it. It seems to me that questions of conflict of laws arising in the tort system presently are not as difficult as they might be because tort law has generally arisen, or had a rather common law development and they have followed more or less the common law lines within the States.

It troubles me a great deal to see a jurisdictional lifting of a large body of liability law from the tort field into the no-fault field in a situation in which motorists and driving of motor vehicles are so typically interstate. It would seem to me that many, many more complex questions of conflict of laws might arise in those situations, particularly in view of the fact that you not only have accidents which are involved but also the character of insurance which is involved and the two may well be in different States.

Now, do you find difficulty with the proposals that have been made here that we might provide for 50 different experiments in 50 different States ranging from complete no-fault coverage to court coverage within the States?

Mr. KUHN. You might have to rule out Hawaii.

Mr. ECKHARDT. We will make it 49 States.

Judge REARDON. Of course, those problems are present. I think—

Mr. ECKHARDT. Still you could have a difference in insurance to look at.

Judge REARDON. Yes, you could. I would be derelict if I did not subscribe to your thinking that many problems would be created. I think, quite frankly, at the moment my thinking about it is that this needs to be experimented over a long period of time before you can really safely assume complete total Federal jurisdiction.

Let me point out to you some of the problems I have, just one, for example, that in many of the States they have dram shop laws and we have some rather difficult questions about the extraterritorial laws from one State to another and we have theories of liability and damages, passive as opposed to a negligent tortfeasor. Placing of a no-fault system on top of these theories and still make it operate on the principles of the dram shop laws of the various States. Quite frankly, Mr. Eckhardt, I agree it boggles the mind to figure out what would happen under circumstances of that sort. I think there may be answers. I think experience may gain them for us. I don't believe they are available at the present time.

Mr. ECKHARDT. Mr. Deacy, and the college have suggested at least a limited approach to this matter, so I would like to address a question to him on the point.

It would seem to me we have two ways to approach this matter conservatively. Within a sense of experimentation and then perhaps fur-

ther expansion and one would be by representing the States take action or by simply doing nothing and wait for States to take action, if they will.

The other would be by a rather cautious Federal approach—it would seem to me that the college's approach is very limited and quite cautious, perhaps desirably so. But if one is to be so careful and so limited as the college has been, I think in its suggestion, why should it not be Federal.

Mr. DEACY. I think that once the matter becomes Federal it will progress from there on a Federal basis and I know there has been a suggestion made, right here today, that it is going to end up with the Federal system running the whole automobile insurance industry.

Mr. ECKHARDT. The lawyers have more or less considered this as a proper sort of common law approach—if it works in the Federal system perhaps it will expand and if it does not work perhaps it will be rejected.

Mr. DEACY. We are in favor of experimentation on a State-by-State basis, not necessarily the same thing in any State, but the essence of experimentation is that you try different things and see how they work in the States. I think this. I feel that the same conditions do not prevail in the various States. I think that in the States that have the great urban centers, you have court congestion, yes, and delay. This is in a very small geographical area of the country and it is not even true in the entire area of the State, as Judge Reardon says, and you get court congestion in Chicago, but you don't have it throughout the rest of Illinois.

Mr. ECKHARDT. If you can show me an urban center in any State where you don't have court congestion, I would like to know about it.

Judge REARDON. They don't have it in Miami.

Mr. KUHN. Nor in Memphis.

Mr. DEACY. Nor in Kansas City, as it is a fairly urban city.

Mr. ECKHARDT. I am delighted to hear it.

Mr. DEACY. I don't know if they have it in Dallas. I don't think they do, but I don't know about Houston.

Mr. ECKHARDT. I know about Houston.

Mr. DEACY. Well, I won't suggest anything. But different conditions prevail in different States. Perhaps there is need for a more radical remedy some places than in others. Our suggestion is indeed a modest one. I think this is how you should begin all of this and try it out and see if it achieves the purpose.

It appeals to me rationally and, from my knowledge of how the system works, and I know quite a little about it, but it seems to me that the influence that would result from this proposal can very well, and maybe it is not the right amount, and Mr. Kuhn or Judge Reardon I think had suggested \$2,000, and I know that other figures are employed in various places. I think Minnesota has \$2,000 in its bill. I think the application would be different whether you are dealing with an urban area or whether you are dealing with a less highly populated area.

Mr. ECKHARDT. Let me go back to a point Judge Reardon raised and that is the relationship between this bill and the question of health insurance generally. It would appear to me, just looking at the matter practically, that there is a trend toward a national program in this

area, whether it is extensive or narrow, of course, is in question, but whether or not it is Federal or State it seems to me to be more or less a foregone conclusion in favor of the former.

Now, you recognize that one of the big items of cost in insurance relates to the question of medical services and hospital services, do you not?

Judge REARDON. Yes, sir; of course.

Mr. ECKHARDT. As a matter of fact, whether a system may, with certain reduction of administrative costs, including legal costs and adjustment costs, reduce the cost of insurance, considering the fact you are pumping in a good number of persons who would be limited if the program did not occur, would well depend on how much of the load of hospitalization and medical expense may be moved out of the burden of insurance premiums; isn't that correct?

Judge REARDON. I think it is correct.

Mr. ECKHARDT. So when we consider a program like this, if we are seriously considering it, don't you feel that it is enmeshed in other Federal concerns?

Judge REARDON. I certainly do.

Mr. ECKHARDT. I would like to suggest a point made in some of the questioning and some of the examination here, and that is that perhaps most of the programs offered here do not include the possibility of recovery to the full gamut of persons who are injured, and I think first that this should be a basic requirement of the program, and would you agree to that proposition?

Judge REARDON. Yes, I would.

Mr. ECKHARDT. In other words, there should not be a payoff for lesser insurance cost by depriving certain persons within a classification of permanent partial disability from a possibility of recovery under either system; would you agree with that?

Judge REARDON. I do.

Mr. ECKHARDT. Yet I think we all must recognize that insurance premium costs are getting somewhat out of hand; do you agree to that?

Judge REARDON. I think possibly that may be true.

Mr. KUHN. I disagree with that.

Mr. ECKHARDT. You disagree?

Mr. KUHN. Yes; yesterday at lunch at the Mayflower, I ordered a cup of coffee that cost 45 cents. I know insurance premiums have not gone that high or in that proportion.

Mr. ECKHARDT. You can go somewhere else besides the Mayflower and get it at half that price.

Mr. KUHN. Yes.

Mr. DEACY. Mr. Eckhardt, medical expenses and cost of repairs to automobiles have gone up tremendously, and this represents two-thirds of the cost of automobile insurance. When the elements that make up the cost that you are paying for, go up like hospital and doctor bills and automobile bills, then the cost of the insurance is going to be greater no matter what the system is.

Mr. ECKHARDT. That is perhaps true. I think we must recognize that it is not the only element of cost here. As we have broken down the elements of cost, it is approximately 15 cents out of the premium dollar that goes into cost of selling the insurance, about 15 cents that

goes into the processing by the insurance company of the claim, which is, I suppose, mostly lawyers and adjusters on that, and there is about 15 cents on the side of the claimant's lawyers, and about 15 cents in other overhead insurance costs, and then there is, of course, about 40 cents recovered by the recipient of insurance.

Of course, this 40 cents reflects medical costs; and insofar as medical and hospital costs may be high, the recipient of the insurance payment may be deprived of certain other benefits that he is entitled to for his insurance dollars; but it seems to me the fact that medical and hospital costs have gone up does not in any way relieve us from the responsibility of attempting to increase that 40 cents out of the dollar for the recipient; do you agree?

Mr. DEACY. I agree with that, and I agree it does relate to the whole cost.

Mr. MCCOLLISTER. Mr. Chairman, may I ask, do we have knowledge of whether those percentages have increased? Has the 15 cents out of that dollar spent for acquisition costs and 15 cents spent for legal fees—do we have any idea whether those percentages as part of the total are increasing?

Mr. ECKHARDT. I don't know.

Mr. DEACY. I don't know where the figures came from, in the first place.

Mr. ECKHARDT. We can establish those sources. The figures come from the Transportation Department's report citing *Keeton and O'Connell* on page 49; and the breaking points establishing these total figures as approximately 45 percent of the entire insurance dollar, I think that comes from the Antitrust and Monopoly Subcommittee of the Senate.

I have no further questions.

Mr. BROYHILL. I have none.

Mr. ECKHARDT. Mr. Guthrie?

Mr. GUTHRIE. As you gentlemen know, the Department of Transportation, when undertaking the study, had a legal advisory committee working with them. Have you contacted, or have you had any contact with, any members of that committee?

Mr. KUHN. Orville Richardson was one, and he was on our Powers committee; and Tom Clark was another, he was chairman of it, I believe, wasn't he?

Mr. ECKHARDT. Do you have reason to believe either of those gentlemen is not in sympathy with the conclusions of the Department of Transportation's conclusions?

Mr. KUHN. I can't speak for anybody that is not here, of course.

Mr. ECKHARDT. I appreciate that.

Mr. KUHN. I don't believe, though, because they are on the advisory committee, they necessarily subscribe to everything in the report. I just don't know what to say.

Mr. DEACY. I can speak positively. I know Orville Richardson does not agree with them because he told me so.

Mr. ECKHARDT. Was there any discussion of their relationship with the staff of the Department of Transportation?

Judge REARDON. Any discussion of their relationship, I wouldn't know that, but I think if you want Mr. Richardson's viewpoint, you

can find it in the report of the Committee of the American Bar, because it appears in full there.

Mr. ECKHARDT. Mr. Kuhn, on page 5 of your statement you raised the question of costs of the "no-fault" system and under the Department of Transportation study, we understand that it cost about \$1.70 to deliver \$1 worth of benefits.

As I understand the "ABA" proposal, the benefits will be extended and have you had your study ever costed out?

Mr. KUH. No, we, being a lawyer and legal organization, we had this commission of the three trade organizations, representatives from the commission, they were representatives and we asked them for the figures because they had them and we didn't and they never supplied them to us, so really we did not cost it out.

We did try to bear in mind in making our recommendation there the question of costs. Six or seven of our recommendations have to do with contingent fees. You will notice what we propose to do about those and we did try to keep costs in mind and our reporter, Frank Marryott, retired general counsel of Liberty Mutual, is familiar with costs, although he didn't have exact figures but we did not really have the costs.

Mr. ECKHARDT. I certainly, on behalf of the committee thank the witnesses for their testimony. I am sure it will be carefully considered.

The committee stands in recess until 1:30.

(Whereupon, at 12:35 p.m., the subcommittee recessed, to reconvene at 1:30 p.m., the same day.)

AFTERNOON SESSION

Mr. Moss. The subcommittee will be in order.

STATEMENT OF VESTAL LEMMON, PRESIDENT, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, ACCOMPANIED BY ARTHUR C. MERTZ, VICE PRESIDENT AND GENERAL COUNSEL

Mr. Moss. Our first witness this afternoon is Mr. Vestal Lemmon, president, National Association of Independent Insurers.

Mr. LEMMON. Thank you, Mr. Chairman. With me at the table here is our vice president and general counsel, Mr. Arthur C. Mertz.

We appreciate the opportunity to appear before this committee and testify concerning H.R. 4994, H.R. 8514 and House Concurrent Resolution 241.

NAII is a voluntary national trade association of some 533 insurers¹ of all types, both stock and nonstock, whose membership provides a representative cross section of the casualty and fire insurance business in America. Our companies range in size from the smallest one-State entrepreneurs to the very largest national writers; they reflect all forms of merchandising, independent agency, exclusive agency, and direct writer, and they include companies serving a general market and those specializing in serving particular consumer groups such as farmers, teachers, government employees, military personnel, and truckers.

¹ 354 members and 179 subscribers to our statistical services.

The independent companies have long been recognized as the most competitive and progressive segment of the fire-casualty insurance business. They have originated by far most of the many policy coverage innovations and improvements in the past 25 years. Their aggressive price competition has saved the insuring public more than \$10 billion in premiums in the last decade alone. Our companies have continued to expand the voluntary market availability of automobile insurance at a rate faster than the rate of increase in new vehicle registration, so that currently they are serving more than half the insured motorists in this country.

Our basic position on the issues which are the subject of this hearing can be summed up as follows:

One, we recognize that certain problems exist in the present system of dealing with the financial consequences of automobile accidents.

Two, great progress has been made in recent years under this system in expanding insurance protection, through such innovations as automobile medical payments coverage, now carried by 85 percent of our policyholders, uninsured motorist coverage, carried by 90 percent of our policyholders, and the advance payment technique in liability cases.

Three, the remaining problems can be alleviated at the State level by reasonable reform measures which further broaden the scope of protection and streamline the system while retaining its fundamental concept of personal accountability and vital rights of recovery.

Four, imposition of a Federal no-fault system governing the automobile accident reparations problem is not necessary and would be contrary to the long-range public interest.

Five, we therefore respectfully urge that H.R. 4994 and H.R. 7514 be not favorably considered by this committee and the Congress. If, indeed, any action is deemed necessary by the Congress, it should go on further than a resolution such as House Concurrent Resolution 241.

SCOPE AND COMPLEXITY OF THE PROBLEM

Our association welcomed the comprehensive DOT investigation of the automobile accident injury reparations system and we so testified during the hearings of your committee in 1968 on the legislation authorizing that investigation. We recognized that an exploding vehicular population and spiraling medical and disability costs were imposing tremendous new strains on the liability system and the insurance system serving it. We noted that the system has been in a continual state of evolution since its origin, and anticipated that the DOT study might well point up the need for further improvements.

The results of that study, to which our companies and association contributed a number of valuable inputs, suggest the following as the major areas of concern by DOT: More widespread compensation of basic economic losses; meeting the special problem of the catastrophic loss; improved speed and efficiency; better distribution of loss dollars by size of claim; encouragement of rehabilitation and reducing court congestion.

As I will point out in a moment, NAAI is dedicated to improvement of the system in all these areas, and is actively promoting State legislation aimed at that goal.

At the same time, as indicated by Secretary Volpe in his report and testimony to the Congress, the DOT study has pointed up the wisdom of exercising caution in deciding exactly what steps should be taken. Even the massive data and findings piled up by DOT do not lead automatically to easy solutions of the auto accident compensation problem, according to Mr. Volpe.

Much legitimate uncertainty exists as to how far and how fast the public wants or is willing to go in changing the reparations system. The price and cost implications of any major change in the system are unknown and essentially unknowable.

The complexity of the problem, and the existence of honest disagreement among informed people as to what remedial measures are best, point to the wisdom of healthy experimentation and change at the State level, rather than Federal action abruptly overturning the whole auto reparations system nationally.

We strongly concur with Secretary Volpe's admonitions on those points.

BASIC OBJECTIONS TO H.R. 4994 AND H.R. 7514

There often arises in the wake of a comprehensive investigation of an existing system or institution a temptation for overkill, a tendency to concentrate on certain negative findings and conclusions of the study, and to press for immediate overturn of the institution. We submit that adoption by the Congress of H.R. 4994, H.R. 7514 or any comparable measure would constitute an extreme and unwarranted form of overkill of problems which are perfectly capable of adequate solution at the State level within the framework of the present system.

The existing fault liability system governing auto accidents and most other forms of accidents rests on several basic principles that developed out of many centuries of hard-won experience by society. One is the principle of personal accountability, the duty of each citizen to use reasonable care not to injure his fellow man, and if he does wrongfully injure him, the responsibility to respond in damages. Liability insurance was created as a means of enabling a person to better meet that responsibility if it arises.

We ask, has this long-recognized principle of human behavior now become unsound, or outdated, as applied to auto accidents? If so, upon what basis?

The only arguments we have ever heard advanced for abolition of this vital principle are based purely on expediency, the supposed need to eliminate at all cost the expense and the time factor involved in administration and enforcement of the principle.

We urge this committee to examine carefully and we know you will examine carefully the dangerous propensities of congressional action abolishing or substantially abolishing this principle, as proposed in H.R. 4994 and H.R. 7514. We cannot conceive of a more damaging blow to driver safety motivation and to traffic law enforcement than for this Congress to declare that henceforth, except where they commit catastrophic harm, some 100 million American motorists are to be freed of all personal accountability to their injury victims for negligence on the streets and highways. This is what the bill will do, and in fairness that meaning and effect ought to have been spelled out in the purpose clause.

We are firmly convinced that such a move, a declaration in effect by the Congress that it no longer really matters who is at fault in the

great mass of auto accidents, will lead inexorably to a deterioration of driver attitudes and weakening of police enforcement efforts, and to a tragic increase in deaths and injuries.¹

Mr. Moss. Well, I must be candid, a statement like that tries my patience. It is ridiculous. There is no such declaration, expressed, implied, or inferred in any proposal the Congress has before it. I don't think you serve your cause by making that kind of outlandish statement.

Mr. LEMMON. We say, Mr. Chairman, I think, a fair construction of this, if I may add this.

Mr. Moss. Well, you just go on with the statement, but I want the record to bear the fact I don't let that go in unchallenged.

Mr. LEMMON. Very good. The folly of bringing about such dire consequences, or even of exposing the American public to that risk, is all the worse when it is noted that this drastic step is not necessary. Those criticisms of the present system which have substance can be alleviated by State legislation which greatly increase the coverage, speed, and efficiency of the system while preserving the vital concept of personal accountability.

PAIN AND SUFFERING

A second major respect in which H.R. 4994 and H.R. 7514 constitute a gross overkill of the problem is their proposed abolition of all right of recovery of pain, suffering, and other general damages except where catastrophic harm has been inflicted.

For the Congress to sweep away this vital right of the American public would be to flaunt what several reliable indicators show to be the wishes of most of the people. A substantial majority of the public when fairly polled on the subject have stated that they are not willing to give up their right of recovery for pain and suffering even if it would reduce insurance costs.² This being so, even a larger majority would we are sure oppose the loss of that right under a program like H.R. 4994 or H.R. 7514 which can only increase insurance costs.

¹ In "Automobile Accident Costs and Payments; Studies In The Economics Of Injury Reparations" (U. of Michigan Press, 1964) the report of the comprehensive study of automobile accidents in Michigan, at pp. 91-92, the value of the fault system in aiding in the traffic law enforcement function is recognized. It is there pointed out that:

"Therefore, an innocent party to an accident has a private incentive to supply police with any information which would tend to throw fault upon other parties. In the absence of the tort claim incentive, many motorists might think it more sporting to have no memory of fault-implying aspects of the accident."

That report goes on to state the following conclusion:

"From these considerations, it appears that tort law probably furnishes important incentives to avoid involvement in accidents involving injury to others, and to avoid conduct which will be charged as negligent, even if it does not unfailingly punish the guilty and limit its reward to the completely innocent.

"None of the other reparations systems appears to furnish an equal incentive in this direction. Workmen's compensation doubtless furnishes an incentive to employers to minimize injuries to their own employees, but their incentive to minimize injuries to others by their employees must reside elsewhere. As for life insurance, social security, and public assistance, the effect of injuring another on one's own taxes or insurance premiums is infinitesimal.

"Therefore, any proposal to eliminate the tort remedy from any area of accidents would call for a close examination into the sufficiency of the other incentives to injury avoidance. At the same time, it cannot be said that minor changes in the tort pattern, by increasing or decreasing the damages, or by relaxing or tightening the negligence standards, are likely to affect significantly the pressure which the ordinary citizen presently feels to avoid injuring others."

² In the 1970 national survey by Market Facts, Inc., of a large, representative cross-section of the public—the only survey which has determined both the attitude and the understanding of the interviewees concerning the concept of tort damages for pain and suffering—a resounding 70 percent of those expressing an opinion were opposed to the idea of eliminating recoveries for pain and suffering, even if it reduced the cost of automobile insurance. In the massive Michigan Law School survey of auto accident victims noted at footnote 1 (above), some 76 percent of those interviewed believed tort recoveries should include damages for pain and suffering.

PRIMACY OF AUTO INSURANCE COVERAGE

Another highly important public policy concept which H.R. 4994 would abrogate is the principle that motoring should pay its way in our society. With minor exceptions the bill would make the prescribed auto insurance no-fault coverage secondary to all other sources of medical and wage loss benefits. The injured party could not collect a penny from this auto insurance until and unless he had exhausted every bit of available benefits from employer sick leave and wage continuation plans, union benefit funds, Blue Cross, Blue Shield, group and individual accident and health coverages, medicare and/or other social insurance programs. Auto insurance would be permitted to be primary only if one of those other plans, coverages or programs expressly chose to make it primary, a conjectural possibility, to say the least.

Making the auto coverage excess over collateral sources would create a host of vexing practical problems including difficulties in ascertaining collateral benefits in connection with rating and with claim investigation, with resulting delay and confusion. Most important of all, though, there are basic public policy reasons why the auto insurance system should be the primary source of recovery for automobile-inflicted injuries, as recommended by Secretary Volpe in his report and testimony to the Congress.

Motoring serves a utilitarian function or a pleasure-producing function, or both, for those who engage in it. But it likewise saddles serious hazards and burdens on our society in the form of deaths, injuries, noise, traffic congestion, air pollution, consumption of natural resources, and so on.

Sound public policy dictates that to the fullest extent possible those who engage in an inherently dangerous or socially burdensome pursuit should bear the full costs of that pursuit, including the costs of all attendant safeguards and measures necessary to minimize or underwrite the damage it inflicts on others. It would be unfair and unwise to shift the costs away from those who engage in the pursuit and thereby subsidize it.

Thus, there is absolutely no justification for shifting a substantial part of the cost of auto accidents away from the activity of motoring and burying it in the cost of non auto-insurance systems, or employer wage continuation programs, or social insurance programs like medicare. It would be no more justifiable than to relieve industrial polluters of the responsibility for installing adequate pollution control devices, and forcing the general public to pay the entire costs of protecting themselves from the consequences of that pollution.

Keeping the full costs of a hazardous, burden-producing pursuit like motoring squarely on the shoulders of those participating in it also provides at least one form of disincentive against unreasonable overuse. Gross overuse by some citizens of the automobile already creates serious problems in America, such as the worsening congestion of our inner cities and arterial highways by the glut of commuter-driven cars which could and should be replaced by mass transportation. To shift a major portion of auto accident losses from auto insurance to outside benefit sources, as H.R. 4994 would do, is a step 180 degrees in the

wrong direction which would seriously aggravate both the traffic congestion problem and the safety problem.

Mr. Moss. I wonder if you would do us the courtesy of explaining how it would aggravate the traffic and safety program.

Mr. LEMMON. Well, there would be no incentive for anyone, as I can see it, to drive carefully any more.

Mr. Moss. Are there not a whole army of highway patrolmen and traffic officers charged with responsibility under the law?

Mr. LEMMON. That is true.

Mr. Moss. Do you mean the only effective control we have over driving practices is the insurance system we have?

Mr. LEMMON. No, sir, I have not said that.

Mr. Moss. I think that is the clear implication.

Mr. LEMMON. I think, if you observe when you see an accident on the streets or highways—

Mr. Moss. Well, I should not show displeasure as to what you choose for presenting your case, but it offends my intelligence.

Mr. LEMMON. Let me give you an example. You are at a stoplight or in the intersection and someone bangs you, the normal person won't move that car until you call the police authorities, but under no-fault if the fellow is crooked or whatever happens he says, "Well, we have to pay our own losses, what is the use of getting the police involved," so there will be no incentive in that respect to call the policeman. I think one of the best studies, Mr. Chairman, if we may, is back in the footnote on page 1081, made by the University of Michigan.

Mr. Moss. I have great respect for it. I would like to know what this was. Let me read the report from the DOT study, the client being the Government of the United States:

Unfortunately the claim of a significant deterrent effect for the present automobile liability insurance system has so far proved unsusceptible by substantial empirical evidence, nor does evidence exist to support the common belief that most accidents are caused by improper and avoidable human error.

Two investigations conducted during the course of the Department's study however indicate that most accidents are caused by environmental or personal factors which are external to the individual's conscious control and punishment or threat therefore is ineffective as a deterrent to deviant driving behavior.

Mr. LEMMON. I think the University of Michigan study, an equally competent study, and we certainly did not pay for it, I think it was done by the university of its own accord, but at page 5 they say the tort system does have a great influence in judgment of that study.

Mr. Moss. We will find out when we have the study. We will hold the record open to receive it.

(The study referred to was not available to the committee at the time the hearings were printed.)

Mr. LEMMON. All right, Mr. Chairman.

We are certain that Secretary Volpe, who has major responsibilities in both the mass transportation and safety areas, had these considerations in mind when he gave support to the principle of primacy of auto insurance in any auto reparations reform programs developed.

FAIR ALLOCATION OF THE LOSS BURDEN WITHIN THE AUTO
REPARATION SYSTEM

A closely related question is that of how the total loss burden within the auto reparations system should be distributed among the different classes of insureds and types of vehicles.

Mr. Moss. Mr. Lemmon, I have to interrupt at this point and recess the committee for 15 minutes to permit members to get on the rolleall which is now on its second round and we will reconvene at 2:15.

(Whereupon, at 2 p.m. a recess was taken to 2:15 p.m.)

Mr. Moss. The committee will resume its hearings.

Mr. LEMMON. One of the virtues of the present system is that, basically, those who present the greatest sources of hazard to others end up carrying the largest share of the total losses. We strongly believe this principle should be preserved.

Here again we find H.R. 4994 and H.R. 7514 reversing the rules of fair play, and decreasing that what has always been right is now wrong and what was wrong is now right. The innocent victim must insure himself against the losses negligently inflicted on him by the wrongdoer, and bear most of the additional insurance cost of that peril.

One area where this question is highlighted under H.R. 4994 and H.R. 7514 is their respective attempts, both unsatisfactory, to deal with the fact that commercial and public vehicles as a group present a greater third party liability hazard than private passenger vehicles.

H.R. 4994 tries to handle the problem by creating a concept of larger than ordinary vehicles and a formula approach by which DOT would assign to those vehicles a percentage of the net economic losses sustained by occupants of other vehicles. This would mean that in individual cases large vehicles would be paying part of the losses of others in accidents which were in no way the fault of the driver of the large vehicle.

H.R. 7514 seeks to right this wrong, but in so doing swings to the opposite extreme, and again produces an inequity. Since it extinguishes third-party liability except in catastrophic harm situations, private passenger carowners will now be obliged to shoulder most of that additional liability hazard which commercial and public vehicles as a group represent.

In short, these bills like all drastic no-fault measures will thrust loss burdens onto the shoulders of people who don't deserve to bear them. Once you depart from the principle that loss burdens should follow the pathways of fault, you do gross injustice to one group or another. And once you start down that wrong road, how can you justify stopping with auto accidents? If the extrahazardous categories of motorists are now to be largely freed of their responsibility to their victims and the victims must bear that loss burden, consistency would dictate that surgeons be immunized from liability for negligence in the operating room, and that manufacturers of foods, drugs, automobiles, and other products be immunized from liability for defects causing harm to the consuming public.

Likewise, carried to its logical conclusion, this philosophy of no responsibility would require freeing industrial polluters of all respon-

sibility to stop polluting, and solve that problem by forcing every citizen to buy himself a gas mask. If this sounds absurd, I submit that it reflects the very same philosophy.

STATE, NOT FEDERAL, ACTION INDICATED

The final major objection, and perhaps the most basic, which we wish to interpose to H.R. 4994, and H.R. 7514, is that adoption of a Federal auto accident reparations program is unnecessary and unwarranted, and would be contrary to the long-range interests of the American public. The proper situs for remedial action is at the State level.

Not only would these bills strip the States of jurisdiction over the whole field of law governing the rights and responsibilities of the public in motor vehicle accidents, but they would move the seat of regulation of our business from the State capitals to Washington, D.C.

As one example of the kind of regulation H.R. 4994 and H.R. 7514 contemplate, they would force every auto insurer to accept and insure for life virtually any motorist who walks in the door, regardless of driving record and potential hazard. All underwriting would be banned, including consideration of such matters as fraud, misrepresentation, illegal enterprises and activities, habitual drunkenness or dope addiction, or long-standing record as a scoundrel and a highway menace. A company apparently will just have to keep issuing lifetime policies to more and more applicants until and unless it can prove to a regulator that it is on the verge of going bankrupt, which then may well be too late to prevent that eventuality from happening.

This little provision, so simple and consumer-oriented on the surface but so deadly in its implications, is a perfect example of what can result from precipitate attempts to cure the intricate problems of insurance regulation of auto accident reparations with one stroke of a pen from Washington, D.C. It can do irreparable damage to a whole industry, and seriously backfire against the long-range public interest as well.

It is perfectly true that mistakes sometimes occur in State legislatures, too. But when that happens it has a relatively limited geographical impact on the public and on the insurance business before it is corrected.

A complete, instantaneous upheaval of the existing reparations systems of 50 States as proposed in H.R. 4994 and H.R. 7514 is an entirely different matter. Radical countrywide experimentation of this kind with an untested new panacea would be at best a dangerous gamble with the public interest, and all the worse because it is an unnecessary gamble.

There are some institutions and fields of activity or enterprise which by their very nature must be regulated nationally. But the legal system governing the rights and responsibilities of persons involved in auto accidents is not one of them. Nor is the insurance operation serving that system. No case has been made for Federal usurpation of this field.

It has been suggested that this step is necessary because motoring sometimes involves interstate travel. If this reasoning were sound, and we submit that it is not, consistency would require that it be ap-

plied to a score of other activities, institutions, and fields which have every bit as much of an interstate flavor or impact as motoring.

It would follow that because the graduates of local schools scatter to the four corners of the country to pursue a career the entire educational system of this country should be federalized.

It would follow that because citizens traveling from one State to another are subject to varying local criminal laws, the Congress should forthwith replace all those statutes with a Procrustean Federal code.

It would likewise follow that the Congress should take over and rigidly control under a Federal master plan virtually every other local institution, business transaction, legal right of action, pursuit, and activity one could name, because all have interstate aspects or impact.

Another pretext suggested in support of Federal action is that the States cannot be depended upon to respond promptly and adequately to meet public needs and wants. We've heard this proposition many, many times before, in fact, it has accompanied every bid for Federal invasion of State jurisdiction since this Nation's founding. If it had prevailed, all State and local government would long ago have been swallowed up, and the daily lives of every citizen would be regulated, lock, stock, and barrel, from Washington.

The members of the State legislatures, are, after all, elected officials just as are the Members of this Congress. I'm sure they would insist, with justification, that they are every bit as close and well attuned to the needs and wishes of their constituency.

The record will show that once a need for change has been clearly manifested and opposing viewpoints fairly presented and debated, the State legislatures are quite capable of moving forward with sound progressive measures.

Look at the record of the States in enacting legislation promoting universal availability of uninsured motorist coverage.

Look at the record of the States in broadening coverages and liberalizing eligibility requirements for those in the assigned risk plans.

Look at the record of the States in adopting strong insolvency legislation.

Look at the record of the States in the passage of competitive rating laws.

Look at the record of the month of October 1970, over 40 laws or regulations governing cancellation of automobile insurance.

Where the auto reparations system proper is concerned, we would point that various proposals for reform, including our dual protection plan, were introduced in a majority of States this year. To suggest, as have some advocates of Federal action, that because those States have not taken decisive action as of today, April 29, 1971, they are foot-dragging, is a most unfair and unjust accusation. After all, the U.S. Department of Transportation, under the direction of this Congress, has been engaged in a massive 2-year, \$2 million study of the problem, the final report of which was not made public until a scant 6 weeks ago.

One might ask, what was expected of the States—to jump the gun and revolutionize their liability systems by guessing at the unseen final findings and recommendations of DOT? And had the 50 States acted precipitately, or even if they now act precipitately, without care-

fully weighing the final DOT report, would not that \$2 million study have been a waste of time and money?

As acknowledged in the DOT report itself, there are many pivotal aspects of this problem which remain highly controversial if not imponderable.

The most basic is, how far and how fast does the public really want to go toward no-fault? DOT itself, even after making its public attitude surveys, isn't certain. Other surveys, too, show that while the public obviously would welcome lower premiums, a majority also wants the fellow who's at fault to be held accountable, and they don't want to give up damages for pain and suffering, either.

How can we find the best measures for reconciling the many different public desires in this area, some of which seem rather inconsistent? Isn't the safest, most sensible approach to do as Secretary Volpe has urged, to go to the State level where the existing reparations systems operate, close to the problem and close to the people, to test our measures which seek a proper balance between the fault and no-fault concepts, and thereby to evolve on an orderly basis a system of sound, up-to-date State laws?

We submit that this is the best, and, in fact the only sensible approach to so complex a problem.

One form of healthy experimentation is already going on in a majority of States right now, and as usual it is our companies who are providing the leadership. An increasing number of companies are automatically including quick-pay protection covering basic medical expenses and wage loss with all their auto liability policies. Public reception of this voluntarily expanded coverage has been excellent.

As an extension of this experimentation, NAIH recently announced and is actively promoting our dual protection plan, calling for State legislative reform which strikes a reasonable balance between the many proposed solutions to this problem.

Very briefly, dual protection calls for inclusion in all private passenger liability policies of at least \$8,000 of medical/disability coverage per person per accident, \$2,000 medical/hospital/funeral; \$6,000 income loss; \$4,500 for loss of essential services by non-wage-earners¹ such as a housewife, payable regardless of fault, to the insured and family, guest passengers, and pedestrians. Every insurer would also be required to offer optional catastrophe economic loss coverage to the insured and family, to take over if and when the basic limits coverage just described is exhausted, and pay medical/disability benefits, regardless of fault, up to a limit of at least \$100,000 per person per accident.

Losses paid by the first-party insurer could be shifted to an at-fault third person or his insurer, thus preserving the important principle I referred to a moment ago.

Among its cost-reducing features the plan, first, prevents duplicative recovery of economic losses under both the first-party coverage and the tort liability system, and, second, requires recognition in wage loss awards of the fact that no income tax is payable, and third, prescribes prima facie standards for determining tort damage awards for pain and suffering in the less serious liability cases. The plan also

¹ Income loss coverage subject to a minimum limit of 85 percent of lost earnings or \$750 per month; non-wage-earner coverage subject to a minimum limit of \$12 per day.

calls for mandatory arbitration of small claims, and for certain other steps to streamline and improve the system. We will be glad to furnish more details about dual protection if this committee desires them, and I believe you have a copy, Mr. Chairman, up there and if you would like to make it a part of the record, fine, and, if not, it is for your information, whatever you would like.

Mr. Moss. Would you like to have it included as part of the record following your statement?

Mr. LEMMON. If you don't mind.

Mr. Moss. Is there objection?

Hearing none, it is the order of the committee. (See p. 1089.)

Our program constitutes a major response to the criticisms highlighted by DOT and this committee. Well over 90 percent of the medical/disability losses suffered in auto accidents fall below the minimum limits of basic economic loss automatically included in each policy under our plan. Thus, the vast majority of accident victims will get instant payment of basic economic losses regardless of fault and without necessity of litigation. Those motorists and motoring families needing and desiring the optional catastrophe coverage of at least \$100,000 per person would also be assured of it, and the premium cost involved would be nominal.

While our plan will thereby deliver much broader benefits to more people more quickly, and with a substantial improvement in the operating efficiency of the system, it also preserves the vital principle of personal accountability for negligence, the equitable rule of loss bearing based on fault, and the important right to recover tort damages for pain and suffering, subject only to prima facie standards in smaller cases. Costwise, the basic features of our program are intended to stabilize or reduce the premiums for the average motorist.

Of course, the major opportunity for effecting auto insurance premium savings lies on the property loss side of the picture, where most of the money is now being expended. The testimony this morning indicated that about two-thirds of your premium dollar for automobile insurance is for automobile personal injury. NAIH and its companies have been devoting a great deal of effort and resources in research into the underlying causes of the spiral in collision and property damage losses and means of reversing that spiral. This subject will be fully treated later when we testify concerning H.R. 4999, the Motor Vehicle Information and Cost Savings Act, major provisions of which have our support.

We have seen nothing to evidence a hue and cry by the public at large for scuttling the present system and substituting a drastic, no-fault program like H.R. 4994 or H.R. 7514. In our considered opinion, the public does want improvement of the auto accident reparations process, but not at the price of sacrificing what is worthwhile in the existing system. The safest and surest way to determine precisely what form of reparations system best satisfies most people's needs is to do what has been done with success on so many occasions in the past, to use the several States as laboratories to test out in the crucible of real-world experience some of the reasonable reform concepts being advanced. Our association is committed to this approach, and we intend to work for timely action by the States to this end.

We therefore respectfully urge that H.R. 4994, H.R. 7514, and comparable measures are unnecessary, unwarranted, and should not be favorably considered by the Congress. We see no need for specific congressional action in this area, but if the Congress elects to act, it should not go beyond the approach embodied in House Concurrent Resolution 241.

(The NAII dual protection plan follows:)

DUAL PROTECTION—A PROGRAM FOR IMPROVEMENT OF THE AUTOMOBILE ACCIDENT COMPENSATION SYSTEM

INTRODUCTION

America today is undergoing a process of critical self-evaluation. Lawmakers, regulatory officials, consumer organizations, newsmen and others are re-examining virtually every institution in our society to determine whether it is operating efficiently and in the best interests of the public.

One such institution is our traditional legal system for determining who is entitled to damages for injuries suffered in automobile accidents, and the amount of damages recoverable. Various studies including the recent comprehensive investigation by the U.S. Department of Transportation have been critical of this system, and have urged improvement or reform.

While nearly everyone with an interest or stake in this question agrees that action of some kind is needed, viewpoints differ widely as to what change is indicated.

At one end of the spectrum are those who urge that nothing be done other than minor modifications of court procedures and adoption of measures to permit damage recoveries in certain situations not now recognized. Some of these proposals would, unfortunately, raise costs without bringing any offsetting savings. Thus they would cause additional, unwelcome premium increases.

At the other extreme are those who propose total abolition of the present liability system and elimination of all personal accountability for negligent driving. They would substitute a system compelling everyone to insure himself against all the consequences of injury and damage from another person's negligence. These proposals have usually been accompanied by predictions of substantial insurance rate cuts—predictions which have been challenged by our Association and others as illusory and unrealistic.

Caught in the middle of this controversy—and often bewildered by it all—stands the American public. Beset by insurance rate increases, they are understandably receptive to proposals which promise premium reductions. Nevertheless, in recent national opinion surveys they have voiced strong support for preservation of the basic concept of personal accountability for highway misconduct, and for the right of an innocent injured party to recover both tangible and intangible damages from a guilty driver.

We do not believe, therefore, that the public wants a compensation system which rewards the wrongdoer every bit as well as his victim. Nor do we believe they would favor a system which in the name of false economy deprives the seriously injured person of his long-standing right to seek damages from a guilty party for pain, suffering and other intangible losses.

Out of the growing controversy comes this question: Is there a viable middle-ground solution to the problem—one which is responsive to major criticisms of the present system, yet does not destroy its many good features?

NAII believes there is such a middle road. In an effort to be of maximum aid to lawmakers, public officials and others considering the problem, we have developed the Dual Protection Plan, a program designed to compensate—

More injured persons' basic medical expenses and income loss;

More quickly; and

More efficiently.

while preserving their vital rights under the existing liability system.

The overall purpose and effect of the Dual Protection Plan would be to—

Provide injured persons automatic payment of their basic economic losses, regardless of fault, up to minimum limits of \$2000 for medical expenses and \$6000 for income loss.

Assure availability to the motoring public of optional catastrophe coverage at modest cost, to raise those basic limits of medical/disability protection to \$100,000 per person, payable regardless of fault.

Preserve an innocent injured party's right to recover additional damages from a wrongdoer over and above those compensated by the basic automatic-pay coverage.

Adopt guiding standards governing damages for pain and suffering in the less serious liability cases, and defining the measure of damages for wage loss.

Improve and speed up procedures for litigating small claims; retain the contingent fee system, under court supervision.

Stabilize or reduce auto insurance premiums by attacking the causes of inflation in major cost ingredients, including fraudulent claims, the rising accident toll, and soaring auto damage repair costs.

This program is offered as a realistic means of alleviating on a state-by-state basis the major criticisms of the present automobile accident compensation system within the basic structure of that system.

Details of the Plan are discussed in the following pages.

I. AUTOMATIC PAYMENT OF BASIC MEDICAL/DISABILITY LOSSES

The traditional American legal liability system applicable to automobile accidents and most other accidents does not compensate all injured persons in all situations, nor was it ever intended to do so. That system undertakes only to give an accident victim a right of action where another person negligently caused his injury; also, in most states the claimant himself must be relatively free of fault. Once a right of action arises, though, the law recognizes all types of damage, including both *tangible* losses (such as medical expenses and lost earnings) and *intangible* losses (such as pain and suffering).

As applied specifically to the automobile accident picture, the existing legal system and the insurance system related to it have been criticized on the following grounds among others:

An accident victim is not assured a source of compensation of any of his losses where he is injured in a one-car accident (driver falls asleep and car strikes a tree), or in a multiple-car accident where fault is totally absent or impossible to determine.

In those instances where legal liability by a negligent third party may exist, although most claims involving insurance are settled rapidly once the facts are known,* investigation and negotiation or litigation of claims nevertheless can necessitate a lag between the time medical bills and wage losses arises and a claim is paid.

Too large a portion of the total cost of the system (insurance premium dollars plus the cost of judicial procedures) is expended in attorneys' fees and court costs, in relationship to the aggregate net recoveries by injured parties.

The insurance industry has already gone part way in responding to these problems, through the growing practice of voluntarily advancing money for medical expenses and wage loss to persons with valid third party liability claims prior to final settlement.

Dual Protection Responds to the Need

In further response to these problems, the Dual Protection Plan will require that all private passenger automobile insurance policies include as a minimum the following automatic-pay benefits:**

Medical expense coverage paying all medical, hospital, dental, surgical and similar expenses up to \$2000 limits.

Disability coverage of \$6000 compensating net loss of income up to \$750 per month;

Benefits up to \$12 per day or a maximum of \$4,500 to other disabled persons such as a housewife, to pay for substitute help to perform services the injured person would have performed.

*Approximately 80 percent of all automobile bodily injury liability claims are disposed of within 6 months after notice of accident, and about 90 percent within one year.

**Resolution of the question of whether the policyholder should or should not be permitted the option of rejecting such basic coverage involves a number of important social policy considerations, such as the individual's need for protection, which must be ultimately resolved by each legislature on a state-by-state basis. Therefore while on balance preferring that this coverage be included in every policy, we recognize that some legislatures may be concerned about those persons who may have no need for this coverage. Accordingly, we will assist each such state legislature in the development of measures designed to accommodate the interests of such persons.

Medical payments will begin immediately, and disability benefits not more than two weeks after the accident. Net income loss is to be computed at 85% of gross income.

These benefits will be payable automatically, without regard to fault*, to any or all of the following persons injured in an automobile accident:

The policyholder;

Members of his family;

Permissive users of the insured car;

Guest passengers in the car; and

Pedestrians struck by the car (in accidents within the state).

The policyholder and his family will be protected not only in accidents involving the insured car, but where injured either while occupying or by being struck by a car that is not covered by similar automatic-pay coverage.

Well over 90% of the persons injured in automobile accidents incur medical and related expenses of less than \$2000 and income loss of less than \$6000. This plan will therefore assure that the vast majority of auto accident victims will receive immediate payment of all their medical bills, regardless of the type or cause of accident, plus income loss payments up to the prescribed minimum limits. Motorists may also elect to purchase the high-limits catastrophe coverage described later.

Dual Protection Provides Primary Coverage

Except as to injuries covered by workmen's compensation systems, payment under the basic automatic-pay coverage will be made irrespective of whether the injured party receives benefits from other sources, such as employer wage continuation payments, unemployment compensation payments or accident and health insurance. To help stabilize costs, however, an offsetting allowance will be made for benefits payable under this coverage in any liability suit the injured party may bring against a third party. Such benefits will also be offset against any claim by the injured party under uninsured motorist coverage applicable to the same accident.

Interim Availability of Automatic-Pay Medical/Disability Coverage

A number of NAII member companies have already pioneered on a voluntary basis the offering to each of their policyholders of basic medical disability coverages similar in concept to what is here proposed.

Pending legislative enactment by the various states of such a program in statutory form, and to make this valuable protection more widely available, NAII has formally recommended that all of its companies voluntarily offer the types of coverages here proposed.

II. MAKE CATASTROPHE LOSS COVERAGE AVAILABLE TO ALL MOTORISTS

One of the problems highlighted by the Department of Transportation study and other recent studies of the existing compensation system governing automobile accidents is the plight of those seriously injured persons who do not have a source of insurance or other funds available to cover all of their out-of-pocket medical bills and wage losses. These would include:

Those who have no legal right of recovery against a third party, such as victims of single car accidents and of multicar accidents where fault cannot be proven.

Those with a valid right of recovery, but with economic losses so large as to exhaust the liability insurance limits and assets of the party at fault.

The Dual Protection Plan responds to this problem in what we believe to be the simplest and most reasonable method available—a method which does not overturn the present system and deprive the seriously injured of valuable existing rights and remedies.

First, as noted, all private passenger automobile insurance policies will be broadened to contain basic automatic-pay medical disability coverage affording at least \$2000 medical benefits and \$6000 income loss benefits. Not only will this largely take care of the economic losses of the vast majority of accident victims who suffer only minor injuries, but it will provide a "benefit floor" for those with

*The proposed statute will permit the basic automatic-pay coverage, as well as the catastrophe coverage later described, to contain exclusions of recovery by (1) a person who intentionally causes the accident, (2) a person driving or riding in a car he knows to be stolen, and (3) a person committing a felony or seeking to elude lawful arrest by a police officer. The legislature may also wish to empower the insurance commissioner to approve exclusions covering other specified types of extreme antisocial conduct.

very serious injuries, and, very importantly, an immediate source of funds to start paying doctor bills and other out-of-pocket expenses.

Secondly, the plan will require that there be offered with every private passenger automobile insurance policy a new form of supplemental "Catastrophe Loss Coverage" applicable at least to the policyholder and his family. Benefits under this coverage will begin when the benefits under the basic coverage have been exhausted, and will compensate all the following types of expenses and losses up to an aggregate \$100,000 limit per person per accident, regardless of the type or cause of the automobile accident:

Medical, hospital, dental, surgical and related expenses.

Net loss of income up to a limit of \$750 per month for inability to work, or, in the case of a nonincome producer, up to \$12 per day for expenses incurred for services in lieu of those the injured person would have performed.

In death cases, (1) survivorship benefits to dependents of up to \$750 per month subject to a \$25,000 limit, plus (2) a death benefit of \$5,000 payable to a named beneficiary.

While the cost of this new Catastrophe Loss Coverage will vary somewhat between different areas, classifications and companies, it is estimated that the average premium for an entire motoring family will approximate 6¢ per day—the price of a postage stamp. That average premium may be even smaller if the coverage is made excess over other sources of benefits, as is permitted but not required under the plan.*

For motoring families which do not have other comprehensive medical/disability insurance programs, this optional coverage will afford massive protection against the motoring hazard at very nominal cost. Even those families which do already have a fairly broad measure of protection from other sources may well wish to supplement that protection with the purchase of this coverage on an excess basis. For people in both categories the coverage will provide a simple, inexpensive way to close any existing protection gap.

III. PRESERVE PERSONAL ACCOUNTABILITY FOR MISCONDUCT ON THE HIGHWAYS

Some extreme proposals for "reform" of the present system would in fact totally destroy it and substitute a system where the wrongdoer and his victim would be treated exactly alike. Such proposals would abolish the age-old principle of law requiring each citizen to use reasonable care not to injure his fellow citizen, and the counterpart rule holding him personally accountable if he breaches that duty. They would, in other words, completely immunize a wrongdoer from any legal action by his victim for damages—provided the injury is inflicted by automobile.

We see no reason why a person should be immunized from generally prevailing rules of personal accountability the moment he takes his automobile out of the garage. Motoring is one of the prime areas where personal accountability should be retained and enforced. To abolish it would constitute an implied public policy declaration by the legislature that the state no longer really cares how badly one maims his fellow citizen, so long as he does it by car. Such a step would have a seriously damaging impact on driver attitudes and would also tend to destroy motivation for strong traffic law enforcement, with a resultant rise in accidents.

The Dual Protection Plan we propose *preserves the principle of personal accountability*. More than that, our Association is bending every effort to find ways of increasing driver responsibility and strengthening law enforcement, thereby reducing the accident toll.

IV. KEEP THE PRIMARY LOSS BURDEN ON THE WRONGDOER

A basic concept which has emerged from the public's concern with auto insurance and accident costs is that, to the largest extent possible, "motoring should pay its way". Acceptance of this premise also requires that motorists creating the greatest hazard bear a greater share of the insurance premium burden, as is generally the case under the present system.

*As with the basic automatic-pay coverage, the Catastrophe Loss Coverage would be made excess over any applicable workmen's compensation benefits, and sums payable under such coverage would be credited against benefits recoverable under Uninsured Motorist Coverage.

This principle would be destroyed by extreme types of "reform" plans which abolish the fault concept and thereby thrust on careful drivers the full burden of insuring themselves against all the losses inflicted by the more hazardous drivers. Dual Protection, however, will preserve this important principle.

Under the Dual Protection Plan, the insurance company issuing the basic automatic-pay coverage immediately pays medical/disability benefits to persons injured while occupying or being struck by that car, whether or not the accident is someone else's fault. The insurer paying those benefits is then entitled to reimbursement from a negligent third party. Reimbursement will occur either by mandatory intercompany arbitration proceedings (if the third party is insured with an insurance company licensed in the same state) or by conventional subrogation procedures.* Thus, those vehicle owners and drivers causing a relatively greater share of the losses will continue to bear a relatively larger share of the total insurance premium burden.

V. ESTABLISH GUIDING STANDARDS GOVERNING DAMAGE AWARDS

A. Awards for Pain, Suffering

Among other frequently voiced criticisms of the present system governing compensation of injuries in automobile accidents are these:

Too much of its total pay-out goes for so-called "intangible" damages and not enough for purely economic losses.

Grievously injured persons with valid claims sometimes fail to recover all their economic losses, while settlements and awards to those with minor injuries average several times their economic losses.

Intangible damages are so nebulous as to be difficult or impossible to measure objectively.

Proponents of total "no-fault" programs use these arguments as a springboard for urging total abolition of all right of recovery for pain, suffering and other intangible elements of damages.

While acknowledging that some remedial action is needed in the area of intangible damages, NAII believes that total or substantial elimination of this basic right of recovery would be unwarranted and contrary to the interests and desires of the American public. It would mean that

A young mother badly crippled for life by a reckless driver would receive nothing for continued pain and anguish and for the severe difficulties encountered in rearing her children.

A child who loses an arm or leg would receive nothing for the resulting disruption of normal occupational, athletic and recreational opportunities and pursuits.

A girl suffering serious disfigurement would receive nothing for a lifetime of humiliation, ridicule and social handicap.

Nothing would be recoverable, either, for destruction of one's manhood or womanhood, or for the loss of companionship of a loved one, or, except to the exact extent of any provable pecuniary costs, for loss of sight, hearing, or any of the other vital senses.

We do not believe the public will—or should—stand still for any measures that would take away intangible damages in these and similar situations of serious injury. Our conclusions in this regard are supported by the results of several comprehensive public attitude surveys.

Governing standards of some kind for pain and suffering awards in minor injury cases are needed, however, to help stabilize or reduce the cost of the system as well as respond to the other problems just mentioned. The Dual Protection Plan proposes such standards to apply to certain cases where liability claims are lodged or suits filed against motorists who are covered by liability insurance policies containing basic automatic-pay coverage.**

*The Plan does not make any specific provision either requiring or preventing subrogation under the optional Catastrophe Loss Coverage; it is left to the individual insurance company to decide whether to provide for a right of subrogation, subject to the laws of the particular state.

**It is proposed that the cost-saving benefits of these standards governing awards for tangible damages shall not be extended to those categories of defendants who have not purchased or otherwise been covered by a liability policy containing the prescribed automatic-pay coverage. Thus, the existing legal rules and procedures for determining damages for pain and suffering would continue unchanged for any liability claim or lawsuit against (1) an uninsured motorist, (2) a commercial vehicle (unless basic automatic-pay coverage was voluntarily purchased), or (3) an out-of-state vehicle not carrying a liability policy containing basic automatic-pay coverage.

Under those standards, awards for pain, suffering, mental anguish and inconvenience would be limited to an amount equal to 50% of the first \$500 of reasonable medical and hospital treatment expenses and 100% of such expenses over \$500.

No limitations would apply, however, to cases of death, permanent total or partial disability, disfigurement or loss of limb, or other special circumstances shown to involve actual, substantial pain and suffering.

Under this proposal, damage awards for pain and suffering in the case of seriously injured persons such as those in the foregoing examples will continue to be determined exactly as they are at present, without any statutory yardsticks. Awards to persons with less serious injuries involving no permanent complications or other special circumstances, though, will be subject to the formula.

B. Income Tax Factor in Liability Awards for Loss of Earnings

At the present time, damage awards for loss of earnings in liability actions are not subject to income taxes. A person who has been awarded such damages actually receives a windfall, because his award is computed on the basis of gross earnings rather than the "take home pay" he would have received had he not been injured. This overpayment can be sizeable where loss of earnings represents a substantial part of the claimant's damages.

To rectify this discrepancy, and again because of the need to achieve every economy reasonably possible in the automobile injury reparations system, we propose that damage awards for loss of earnings in liability cases be subject to an offset of 15% for the income tax that presumably would have been payable if the earnings had actually been realized. The statute would clearly provide, however, that if the claimant can establish that his earnings would actually have been subject to a smaller income tax rate, or to no tax at all, the tax offset would be reduced accordingly or completely eliminated.

VI. IMPROVE PROCEDURES FOR DISPOSING OF CLAIMS AND LAWSUITS

While most claims arising out of automobile accidents are settled within a relatively short period and without necessity of litigation, delay does remain a problem in some instances and areas. It should be noted that delay in many cases is not the fault of the defendant or his insurer. It may, for example, result from lack of adequate or timely information from the claimant as to the nature of his injuries and medical treatment. Or, where a lawsuit is filed, it may be delayed by the backlog of cases that have glutted the court docket or the lawyers' dockets.

For a number of years, NAIH and its member companies have been directing their efforts to finding means of streamlining and otherwise improving both the claim settlement process and the judicial process, so as to eliminate or minimize unnecessary delays and other sources of friction occurring at any points in the system, for any cause.

Advance Payment Procedure

Thus, NAIH members have been in the forefront of those companies employing the advance payment procedure in cases of probable liability on the part of their policyholders. Money is immediately and voluntarily advanced to the injured third party to cover medical bills, wage loss and other expenses; no release is required—only a gentlemen's understanding that if suit is ultimately brought the sums advanced will be credited against the amount demanded.

Through the increasing use of this technique in recent years hundreds of millions of dollars have been put into the hands of accident victims *at the time needed*. Just a few of the many examples of its use are listed in the attached excerpt from the 1968 treatise "Advance Payments in Liability Claims" by Buchheit, Young and Kurtoch.

The legal implications of advancing monies voluntarily without taking a release may constitute some deterrent to even fuller use of the advance payment process in some areas and situations. Therefore, the Dual Protection Plan includes a proposed statutory provision for those states which do not already have one, to make it clear, among other things, that voluntary advance payments shall not be construed as an admission of liability by the insurer or its policyholder, and to assure that sums so advanced will be credited against any recovery in a lawsuit.

Voluntary Claim Guiding Principles

Several years ago, in furtherance of its member companies' policy of providing the best possible service to the insuring public and to automobile accident victims, the NAIH adopted and implemented the attached Guiding Principles Relating to Automobile Insurance Claims. These Principles, which constitute a summary and restatement of long-standing good practices by claimsmen, were developed and approved by this Association's Claims Committee and Board of Governors and distributed to our entire membership in January 1969. They now constitute an important part of the basic policy of this Association and its membership.

Expedite Small Claims

NAIH recognizes that notwithstanding voluntary efforts such as these by insurers to improve and expedite the claim settlement process, problems remain which call for further steps. The sheer number of auto accidents and the necessity for determining their cause and evaluating the resulting injuries and damage occasions some delays, especially where disagreement arises as to either of those issues.

Critics of the present system have emphasized the fact that viewed both from the *time* standpoint and the *cost* standpoint, the system is least efficient where it involves litigation of the *smaller* cases—those entailing minor injuries, or no injuries but just property damage. We believe that the time and expense expended in the trial of a lawsuit under our traditional judicial process can, for example, be justified in a controverted case involving a claim of tens or hundreds of thousands of dollars for alleged permanent disability. But it is wasteful to have to invoke the same costly and time-consuming procedures for the resolution of every disputed claim for a few hundred or thousand dollars.

Again, the solution does not necessitate scrapping the whole system as some would advocate. It can be achieved by remedial steps within the basic structure of the system.

As noted earlier, for the vast majority of automobile accident victims (including many now barred from recovery) the Dual Protection Plan by providing automatic payment of basic medical/disability benefits will eliminate any problem of delay in obtaining funds for payment or reimbursement of economic losses for injuries. Such benefit payments will be made promptly upon receipt of medical bills and wage loss information, without awaiting any determination as to fault or cause of accident.

Property damage to vehicles will continue as at present to be compensated from two sources: (1) by claim against the vehicle owner's own collision coverage; or (2) by claim against the party at fault, if any, and in turn the latter's property damage liability insurance coverage. Like the proposed automatic-pay medical/disability coverage, collision coverage pays off immediately, regardless of fault. The insurer then has a right of reimbursement from an at-fault third party, if any, and his liability insurer.

Thus, both as to vehicle damage losses and basic medical/disability losses, the great majority of automobile accident victims will be compensated promptly and without regard to cause of accident. The issue of which insurance company should ultimately bear those losses in multiple-car accidents will subsequently be resolved either by intercompany arbitration (a very economical process already widely used by the insurance industry) or where necessary by subrogation action. Most important, the basic benefits are paid to the claimant first and then the companies decide between themselves which one should bear the loss.

There will of course remain to be disposed of through the customary settlement procedures, or through litigation where necessary, (1) claims for intangible losses and for economic losses in excess of the basic automatic-pay benefits, (2) claims for property damage not compensated by collision coverage, and (3) injury and death claims arising in motor vehicle accidents not covered by private passenger automobile liability policies issued in the enacting state.

Small Claims Arbitration

To aid in the prompt, economical disposition of the smaller claims in these residual categories which cannot be resolved by the settlement process, and especially for use in states with a court congestion problem, the Dual Protection Plan includes a proposed statutory provision authorizing creation of a small claims arbitration system to handle all cases up to \$3,000 in amount.* This measure is

*Or such other "threshold" level a state legislature may see fit to establish.

patterned after the highly successful Pennsylvania law under which many thousands of small claims (both third party liability cases and other types of civil cases) have been removed from overburdened court dockets and processed quickly and reasonably.

As an alternative to this approach, our Association would give support to the creation of special small claims courts designed to accomplish the same general objective as the Pennsylvania arbitration plan.

Disclosure of Medical Evidence

Prompt settlement of claims is sometimes delayed because the defendant and his insurer are denied access to all the information they reasonably need to evaluate the claimant's injuries and validate medical treatment expenses. In some instances such information is withheld until a lawsuit has been filed and trial commenced.

To alleviate this problem, the Dual Protection Plan provides that persons claiming damages or policy benefits for injuries sustained in an automobile accident shall if requested consent to physical examination by a doctor supplied by the defendant or the insurer. It also requires such claimants if requested to provide any information reasonably needed concerning the injuries claimed and the treatment undergone.

Other Remedial Steps

In addition to the steps just described, NAII and its members are prepared to support and specific action or measures needed locally to eliminate special problems that may cause or contribute to unreasonable court delay. Our staff, committees, and company officials have given a great deal of study to the court congestion problem and have initiated or participated in projects in various areas designed to alleviate it. We will continue to work in every way to help make the judicial system operate fairly and efficiently.

VII. COURT SUPERVISION OF CONTINGENT FEES

One of the most controversial features of this country's existing legal system is the long established practice by plaintiff lawyers of handling most personal injury cases on a contingent fee basis. Under this arrangement no fee is paid or payable unless a settlement or judgment is obtained. In the event of recovery the lawyer receives a percentage of the total award recovered; that percentage often amounts to 33⅓% and sometimes more.

Proposals have from time to time been advanced either to prohibit contingent fee arrangements completely, or to restrict their use to cases involving indigent claimants.

There have unquestionably been some abuses within the contingency fee system. However, contingency fee arrangements do serve the worthwhile purpose of assuring an injured person the availability of legal counsel without the necessity of advancing or committing himself to a substantial fixed fee or retainer.

The Dual Protection Plan calls for retention of the contingent fee system, but with somewhat closer court supervision: It provides for adoption by the courts of rules prescribing maximum contingent fee schedules applicable to all motor vehicle accident cases under their jurisdiction. A lawyer could file for a higher fee allowance from the court in any case where he believes those prescribed are not adequate. Unlike some other programs, our plan does not itself specify any maximum percentage figure; that is left to the courts to prescribe.

Precedent for such regulation of fees can be found in the court rules in several states, as well as in the Federal Tort Claims Act. The probate courts in many states also regulate and require disclosure of fees in probate cases.

We believe that reasonable regulation of contingent fees as here proposed in states lacking such specific procedures will prove beneficial both to the public and to the legal profession. It is our further belief that this type of regulation will elicit support from within the bar itself.

VIII. CURB INFLATION IN MAJOR PREMIUM COST INGREDIENTS

While Dual Protection is intended, among other things, to stabilize or reduce the cost of automobile insurance, the NAII is aware that truly dramatic premium savings can only come as and when progress is made in curbing the major underlying cost ingredients of the insurance premium dollar. Chief among these ingredients are the highway accident spiral and the upsurge in costs of treating human injury and repairing damaged automobiles.

With this in mind, the NAIH and the safety organizations it supports have been engaged for many years in intensive efforts to reduce accidents and decrease injury severity through research, public education and the fostering of strong traffic laws and enforcement. In addition to individual company efforts in the traffic safety area, NAIH companies collectively have provided the major share of the operational budget of the Insurance Institute for Highway Safety, an independent, non-profit organization dedicated to the reduction of highway accident loss.

Attack the Larger Half of the Loss Picture

Though the primary emphasis of our efforts must continue to be focused on curbing deaths and injuries, the greatest opportunity for effecting significant premium savings lies on the material damage side of the loss dollar. Today, almost two-thirds of the auto insurance premium dollar for a typical package of insurance including a late model vehicle is spent for car damage coverages. More than 10 times as many people incur damage to their cars as incur personal injuries!

For these reasons, the NAIH has been in the forefront of efforts to stabilize the cost of vehicle damage insurance through programs directed at the improvement of automobile design and the reduction of auto damage repair costs.

Our Association in recent years has been continually spotlighting—in Congressional hearings and elsewhere—the four basic causes behind the upsurge in material damage losses: speed, horsepower and high-performance cars; the spiral in automobile prices and the prices of crash repair parts; the increases in repair garage charges, and the extreme vulnerability of today's automobiles to costly damage even in low-speed crashes.

This constant public airing of a critical problem has helped to touch off an encouraging chain of events. Auto dealers have reported a decline in the sale of "hot" cars; auto manufacturers announced they were shelving certain plans they had for further souping up the horsepower of some of their new models, and several of the major car-makers have said they will install functional bumpers on their cars for 1973 and beyond.

NAIH has also been engaged in pioneering research programs designed ultimately to cut the costs of repairing damaged automobiles. One of these projects is being conducted under NAIH sponsorship by the Cornell Aeronautical Laboratory. Its purpose is to determine if the damage to a car in a given crash situation can be analytically projected before the crash takes place, and even before the car is put on the market. If this concept proves feasible, as preliminary indications suggest, then cars can be indexed according to their relative vulnerability to damage and their cost to repair. Premium rates, in turn, could be based upon such an index.

In addition, the NAIH has been devoting intense study to the need for establishing an industry-sponsored research center whose purpose would be to pioneer new cost-saving techniques in the field of automobile crash repair. A team of NAIH staff and member company representatives recently traveled abroad on two occasions to study the operations of the Motor Vehicle Crash Research Centre in Britain, and a similar facility in Sweden. Though they have been in existence for only a short time, these unique facilities have already produced a number of advances in repair technology. The NAIH is continuing to explore this concept to evaluate its feasibility and practicability in the United States.

Our Association is optimistic that through projects and studies of the kind just described, we will be able to make a substantial contribution to the goal of reversing the rising trend of automobile insurance costs.

Crack-Down on Claim Fraud

As mounting loss payments exert increasing upward pressure on automobile insurance rates, the insurance business must devote extraordinary efforts to eliminate every element of unnecessary cost. One serious and regrettable continuing source of waste is claim fraud, a scourge which adds tremendously to the insurance cost burden borne by the American public.

Programs to expose and combat claim fraud have long been carried on by individual insurance companies and organizations. In order to increase the effectiveness of such actions NAIH and the other leading casualty insurance trade associations have recently participated in the creation and staffing of a separate new instrumentality, the Casualty Insurance Fraud Association (CIFA), to deal solely and specifically with the problem. CIFA will aid and complement the work of overburdened law enforcement agencies nationally by investigating sus-

pected fraudulent activity in automobile and general liability insurance situations. It will give priority to exposing and bringing about the prosecution of organized auto accident fraud rings, which ruthlessly pick the pockets of the insurance-buying public by countless millions of dollars annually.

To provide a more adequate statutory framework for prosecution in states now lacking strong and explicit laws on the subject, the Dual Protection Plan proposes legislation imposing stringent penalties for conviction of any type of claim fraud arising out of automobile accidents. It calls for a fine of up to \$500 or imprisonment up to one year, or both, upon conviction of a first offense involving a claim up to \$100 in amount, and a fine of at least \$500 or imprisonment up to 10 years, or both, for convictions of a fraudulent claim of over \$100 or for a second or successive conviction regardless of amount of claim.

CONCLUSION

By way of summary, the Dual Protection Plan will :

Compensate the basic economic losses of the vast majority of automobile accident victims, including many now receiving nothing from the accident reparations system.

Afford optional protection against the hazard of catastrophic economic loss, at nominal cost.

Pay such benefits immediately when needed, without regard to questions of fault.

Preserve the innocent injured party's right to recover additional damages against a wrongdoer.

Adopt reasonable standards for ascertaining damages for pain and suffering in the less serious cases.

Retain personal accountability for negligent driving, and keep the major share of the premium cost burden on those who present the greatest hazard on the highways.

Increase the speed and efficiency of the present system, particularly as to smaller claims and losses.

Help relieve court congestion.

Stabilize or reduce automobile insurance premiums and cut the overall cost of the accident reparations system.

State-by-State Implementation

NAII believes that determination of the rights, responsibilities and compensation of individuals involved in automobile accidents should remain a matter of state law, as at present. The Dual Protection Plan is designed for that purpose, and is readily adaptable to the specific problems and statutory settings of different states. It is submitted as a program of evolutionary reform which will bring the public an increased measure of protection against economic loss without sacrificing their vital rights and valuable benefits under the present system.

Additional information about the Plan is available upon request.

EXCERPT FROM ADVANCE PAYMENTS IN LIABILITY CLAIMS—BY BUCHHEIT, YOUNG AND KURTOCK, OCTOBER 9, 1968

The following examples submitted by contributing companies will assist the reader in understanding the scope of advance payments in present practice.

(1) A Canadian insured, operating his vehicle on a gravel, wet road, failed to negotiate a curve and struck a tree stump. His passenger, a 33 year old waitress, sustained a fractured femur, with open reduction and subsequent infection. Her total period of hospitalization was 153 days. Her husband had been unemployed, and the bank was threatening foreclosure proceedings on their home mortgage. The adjuster paid off the mortgage as well as the hospital and medical bills, in an advance payment of \$5,800. The mortgage officer of the bank was an enthusiastic promoter of the company and its advance payments program, and the action taken was a topic of discussion in the community for many weeks thereafter.

(2) Claimant, a minister, sustained an injury to his larynx, and while recuperating, was unable to talk above a whisper. A replacement minister was unavailable. The adjuster purchased an amplifier system for the church which was received by the minister and congregation with gratitude. The claim was

concluded for actual expenses incurred, and the amplifier system was donated to the church.

(3) One claim involved a serious chartered bus accident on a snow drifted mountain road, resulting in three deaths, three serious injuries, and thirty-five minor personal injury claims. All of the claimants were soldiers on their way home for Christmas. The company claims representative met with the commanding officer of the army base and arranged for a charter flight, with advance payments to each soldier to cover his personal expenses, plus air line tickets for his return home, and return to base. The General Staff of the army at the Pentagon in Washington, D.C. were most complimentary of the manner in which this case was handled.

(4) In a remote section of the Northwest, a young man sustained severe and disfiguring facial injuries as a result of an accident arising out of the insured operator's gross negligence. His parents were of modest financial means and the carrier arranged to transport him periodically to a large city where he was attended by one of that city's top plastic surgeons. Total funds advanced exceeded \$10,000. The ultimate results were excellent, and the young man subsequently invited the adjuster to his wedding.

(5) A college senior was killed. In attempting to effect an adjustment with the parents of this boy, the adjuster realized that the parents were not interested in financial compensation as such. After some consideration, the adjuster proposed establishing in perpetuity a scholarship at the university in the name of the deceased. He also purchased a permanent trophy to be maintained at the deceased's high school from which he graduated as valedictorian of his class. The names of scholarship awardees will be inscribed on the trophy.

(6) A sixteen year old boy was seriously injured by an automobile while riding a motorcycle. He sustained comminuted fractures of the right femur and of both bones of the left forearm. Faulty healing required a long period of disability and it was feared that the boy might never return to high school. In addition to advancing the money to pay the medical and hospital bills, the company arranged to have a two-way speaker system installed between the hospital room and the classroom. The boy not only hears what goes on in the classroom but he recites and takes part in classroom discussion.

(7) Over \$72,000 was advanced by one company to a quadruplegic. A rehabilitation program caused restoration of some function and the injured party is now able to take care of herself without round-the-clock nursing service. The case was finally settled by the purchase of an annuity.

(8) A fifty-two year old man sustained serious back injuries. After advance payments had begun, the claimant retained an attorney through whom payments were continued. The attorney and the adjuster worked with the State Rehabilitation Board and succeeded in putting the injured party through an educational program which resulted in full rehabilitation.

(9) A twenty year old girl sustained serious fractures of both femurs. Repeated surgical procedures were required. Payments were advanced in excess of \$7,700, including over \$1,000 for the services of a Christian Science practitioner and over \$800 for telephone communication with this practitioner who was located in another state. Included in the total advanced was a special tuition allowance to permit the claimant to keep up with her education while disabled. In this particular case, a final settlement offer was made at which time the claimant consulted a prominent attorney. His recommendation was that the settlement offer be accepted.

(10) A fifty-seven year old executive sustained an extremely severe injury to the knee in 1966, and has been unable to work since. A total of \$17,736 has been advanced to date, and the company is now considering a choice of annuity arrangements together with a policy which will take care of further medical or surgical expenses resulting from the injury.

(11) A fifteen year old girl sustained a skull fracture, comminuted fracture of the left femur and other injuries. She was in a coma for three days and her life was in danger. The company, notwithstanding a low policy limit, began paying medical bills, paid the private duty nurses weekly, and paid the mother \$100 a week so that she could quit her job—relocate near the hospital and help her daughter recover.

(12) A twenty year old married truck driver sustained an injury which required the amputation of a leg. The company advanced hospital and doctor bills and net take home wages. A lawyer was engaged by the family shortly thereafter and the advance program was continued through him. The case

was ultimately settled in what the company believes was a very favorable climate produced by their willingness to give immediate assistance.

(13) A fifteen year old girl sustained severed ligaments to her hand and nerve damage. Hysteria was tightening the hand into a mere claw. The local physician recommended the attention of specialists. The girl was immediately sent to a Hand Rehabilitation Clinic at a nearby university, undergoing surgery twice, and emerging with only a 15% residual disability. The family was one of moderate means and could not have afforded this care without the assistance of the insurance company.

(14) An automobile occupied by two young people was hit head-on by the insured. Both claimants were hospitalized. The parents arrived from out of town and the adjuster assisted them in registering at a motel, arranged airplane tickets, purchased new clothing for the injured claimants, took care of the hospital bill, had the automobile repaired and paid for it, and finally took the family to the airport for their return home.

(15) The claimant, a laboring man traveling on motorcycle, sustained a badly crushed leg which the local physician felt would necessitate amputation. An offer by the adjuster to move the claimant to a large medical center some distance away was gratefully accepted. The best orthopedic talent was put on the case and the leg was saved. During the period of convalescence, the adjuster made arrangements to have the wife live near the center and took care of her transportation and room and board. A total of \$17,000 was advanced and final settlement was made directly with the family for a substantial additional sum of money. Total treatment, including extensive therapy and rehabilitation, took approximately two years.

(16) A twenty year old married claimant was struck head-on by the insured's tractor-trailer. He sustained numerous serious and disabling injuries. Advance payments were begun, and continued after claimant obtained legal representation. In less than eight months, a total of almost \$11,000 was advanced for medical, wages, and incidental expenses, plus \$1,200 for damage to the automobile. The case was settled without litigation.

(17) A fifty-seven year old married female suffered fractured legs, fractured arms, and a fractured nose, jaw and ribs. Before the accident she operated a gift shop. The husband had to leave his job and run the shop during her convalescence. Advances of approximately \$5,000 were made for hospital expenses not otherwise covered, lost wages and incidental expenses. The case was settled directly with the claimant for a sum very close to the substantial policy limit.

(18) An elderly woman sustained a fractured hip in a fall and was hospitalized and later placed in a rest home for convalescence. Her principal concern was the possible loss of her small apartment because of her inability to pay for rent and utility. The adjuster saw that these expenses were taken care of monthly and presumably at this date the claim has been disposed of amicably.

(19) A college football player, seriously injured in a crosswalk, lost his football scholarship. The company advanced his tuition and other expenses to permit him to continue college, prior to settlement. The young man has now graduated from college and the case brought to a satisfactory conclusion.

(20) A claimant, injured in a fall, required physiotherapy and was reluctant to make continued visits to a doctor's office. The claim representative advanced him \$100 to take out a membership in a local health club which provided the needed facility. The claimant later returned \$30 of the advance to the claim representative, advising that the membership was only \$70.

GUIDING PRINCIPLES RELATING TO AUTOMOBILE INSURANCE CLAIMS

INTRODUCTION

The National Association of Independent Insurers and its member companies believe that the administration of automobile insurance claims is the ultimate service and product of automobile insurance. The claims function must be performed with integrity within the framework of the American legal and judicial system, governmental regulation, and the contractual provisions of automobile insurance policies. We continue to conceive our objective in the disposition of automobile claims to be the administration of justice in the day-to-day affairs of men by the application of these factors to each individual occurrence.

Because of our contractual relationship, we owe a loyalty and duty to those whom we insure. We represent them, and we act in their interests. It is our duty to act efficiently and economically. In addition to our contractual duty to our insureds, we recognize our obligation to process claims in such manner as to serve the social and economic welfare of the American public. In keeping with this obligation, many of our companies are employing various new techniques in payment and settlement such as payments in advance of final settlement, rehabilitation and open-end releases.

Now, therefore, we reaffirm and publish these Guiding Principles relating to Automobile Insurance Claims. They are of necessity general in scope and as in the case of any other general principles must be read in the context of the law and practice in the state or area in which business is conducted. We declare it to be our earnest intent and purpose to:

(1) Conduct claim investigations in a diligent search for the facts as promptly as possible.

(2) Contact claimants promptly as to an accident initially reported by an insured in which there is reason to believe the insured may be legally liable.

(3) Contact the insured promptly as to an accident initially reported by a claimant, and continue processing the claim.

(4) Determine the amount of automobile and other property losses promptly and fairly.

(5) Respond promptly, when a response is indicated, to all communications from insureds, claimants, attorneys and other interested persons.

(6) Give a prompt, courteous and forthright explanation to each claimant as to the company's position with respect to his claim.

(7) Conclude each claim, large or small, on the basis of its own merits, in the light of the facts, the law, and the coverage afforded.

(8) Pay meritorious property damage claims promptly without requiring simultaneous settlement of bodily injury liability claims.

(9) Investigate coverage questions expeditiously; inform the insured and claimant of the companies' position as promptly as possible; litigate only meritorious policy defenses.

(10) Assist in the physical rehabilitation of injured persons where such procedure is indicated by the injury, the liability and the policy provisions.

(11) Facilitate, in the case of claims involving more than one company, the prompt and fair disposition of the claim, later seeking to resolve any controversy between insurance companies without recourse to the courts.

(12) Co-operate in every proper way, when a claimant files suit, to secure prompt disposition of the litigation.

(13) Review at the management level all complaints received concerning claim handling.

(14) Adhere to the ethical standards set forth in the Statement of Principles adopted by the National Conference of Lawyers, Insurance Companies and Adjusters.

(15) Seek and support new methods designed to provide improved claim services for the public.

Mr. Moss. We will have a brief suspension so Mr. Eckhardt can make the rollcall and then we will continue.

(Whereupon, at 2:35 p.m. recess was taken to 2:45 p.m.)

Mr. Moss. Mr. Eckhardt.

Mr. ECKHARDT. Mr. Lemmon, if we assume all but 40 cents of the premium cost goes for—in about equal shares—the cost of sales, plaintiffs' lawyer costs and other court costs for the claimant, costs of the lawyer for the insurance company and his adjusters or its adjusters and for other overhead costs and sales and profits, if we assume this to be the case and if we also assume of the 40 percent left the dollars buy less because of increased medical and hospital costs, do you not think there is a justifiable concern on the part of the Congress about the plight of the insured under the present system?

Mr. LEMMON. I do not necessarily agree with the figures you cited.

Mr. ECKHARDT. In what respect do you disagree?

Mr. LEMMON. I suppose these came from the panel.

Mr. ECKHARDT. The breakdown with respect to the cost come from Keeton and O'Connell and the division figures of about 45 percent of the total amount being involved in insurance company costs comes from the antitrust investigation, I think, by a Senate committee.

Mr. LEMMON. I do not know how big a spread this covered, but I guess the insurance bible for banks and insurance companies collected these figures for 50-odd years or longer and according to their 1968 figures, countrywide, the automobile injury report for stock companies is 14.8 percent; for mutual companies, 6.5 percent. The acquisition costs as well as other portions of the expense dollar have been going down each year.

Mr. ECKHARDT. What do you mean by acquisition costs?

Mr. LEMMON. Agency commission and field supervision.

Mr. ECKHARDT. That is what compares to the figure I recited to you of about 15 percent which constitutes the costs of selling insurance in the figures I gave. Do you have any figures with respect to the cost of claims and litigation costs, et cetera?

Mr. LEMMON. Yes, sir, and I will leave this pamphlet with you if you like.

Mr. ECKHARDT. You gave me 14.8 percent and then you gave me 6.5 percent.

Mr. LEMMON. Stock companies from 14.8 percent as a group. The mutual companies as a group have 6.5 percent.

Mr. ECKHARDT. Now, can you give me the average figures for the servicing of a claim on the insurance company side, litigation costs, lawyers' costs, all other costs involved in such claims on the average?

Mr. LEMMON. To the extent that I can, Congressman, some of these plaintiff-lawyer costs and stuff like that—

Mr. ECKHARDT. No; I am talking about company lawyers this time and, of course, this would include the cost of the insurance adjusters, the lawyers, the entire cost of processing the claim on the insurance company's side.

Mr. LEMMON. Except for the plaintiff's attorney's fees. They would not be in there.

Mr. ECKHARDT. I don't want to include the plaintiff's attorney's fees here unless you want to give them as a lump.

Mr. LEMMON. We have no way of knowing.

Mr. ECKHARDT. Let's leave out the payment for the claimant and take the insurance company side.

Mr. LEMMON. Most of the attorney's fees for the claimants in the claimant's estimate—

Mr. ECKHARDT. Do you have that figure?

Mr. LEMMON. Yes, sir; let me give it to you here.

Mr. ECKHARDT. Could you just let me have it.

Mr. LEMMON. Yes, sir. I can provide you with additional copies.

Mr. ECKHARDT. I thought you might want to read it into the record. What percentage is that?

Mr. LEMMON. These figures were taken from Best's Aggregate and Averages, which is one of the recognized data-collecting agencies of the country and the New York Insurance Department which collects insurance loss data. California does the same thing, and they report theirs quarterly and several other States. But these are the figures from these reports.

Policyholder benefits, payments to claimants on behalf of policyholders, claims paid or to be paid, no loss adjustment expenses, stocks and mutuals included: 62.8 percent on auto BI.

Company claim adjustment expenses—these are what they include—expenses assumed on behalf of policyholders for investigations, defense counsel, expert medical testimony, and other services necessary for settling claims: 14.2 percent.

We consider these insurance benefits, policyholder benefits. These total 77 percent.

Now, on the expense end, commissions and brokerage, stocks and mutual, according to these figures, show 12 percent and other acquisition expenses, other sales expenses including salaries and expenses for soliciting and procuring business, collecting premiums, advertising, and so forth—6 percent; taxes, licenses and fees—3.1 percent; and general administrative expenses—5.2 percent.

Mr. ECKHARDT. Could you give me a profits figure on the average? I guess we would have to be talking about net profit.

Mr. LEMMON. In these there is no profit because you had 101.103 percent loss ratio of total losses.

Mr. ECKHARDT. So this is a net loss instead of profit?

Mr. LEMMON. That is right.

Mr. ECKHARDT. So we would not put any figure in for that. Will you go with me on the 15 percent for the claimants' attorney's fees as an approximate percentage of the total premiums paid?

Mr. LEMMON. That would include claim adjustment expenses and investigation.

Mr. ECKHARDT. I am talking about the claimant's cost of litigation.

Mr. LEMMON. We do not have any way of knowing about claimant's attorneys. There have been a lot of guesstimates as to what claimant's attorneys get. We have tried to make some surveys but that is pretty difficult to obtain.

Mr. ECKHARDT. But 15 would not seem out of line. Those are the figures we have here.

Mr. LEMMON. It might be a little on the high side because the plaintiff's attorneys claim they win half and lose half, so that might be a little high on the average.

Mr. ECKHARDT. By using this percentage for the stock companies of 56.1 percent, that is 19.2 percent acquisition, 13 percent adjustment, 8.9 percent administration and taxes, and 15 percent plaintiff attorney's fees. As I figure that, it totals 56.1 and we come pretty close to the proposition from your own figures that the claimant then out of the insurance dollar gets 43.9 cents which is not very different from the the figures I worked out from the other source of 40 cents out of the claimant's dollar. Of course, if he is dealing with the mutual companies, he does a little better. But still he gets somewhere around half or less than half of the premium dollar in receipts under total claims.

Do you know or do you agree that that is being within the ballpark of being an accurate figure?

Mr. LEMMON. I have heard these figures kicked around but the cold fact is according to these figures we are paying out 62.8 percent on behalf of our policyholders.

Mr. ECKHARDT. You recognize the stock companies to be paying out less—

Mr. LEMMON. Aggregate of stock and mutuals. We are talking about losses now. We are not talking about commissions.

Mr. ECKHARDT. May I ask, Mr. Chairman, that we permit the gentleman to introduce his figures that he has been reading from at this point in the record.

Mr. Moss. I hope that you would ask that we receive it for the files rather than introduce it into the record. I would like to know the basis for the figures because at this moment I feel they are of little value unless we know what they represent.

Without objection, we will receive the material for the committee files.

(The material referred to was not received at the time the record was printed.)

Mr. LEMMON. There are general expenses, salary and so forth, which is 5.2 percent, taxes, fees, Federal income tax, 3.1 percent, making a total operating expense of 26.3 cents.

Mr. ECKHARDT. I am sure these will all be taken into account. We shall attempt to establish the sources.

Mr. LEMMON. I will be glad to file the underlying support information if that would be helpful.

Mr. ECKHARDT. I would like to ask you about your denying the amount received in reparations as a result of injuries. You do deny that is where around 50 percent of what is received comes from and I understand you said it runs more on the order of 60 percent than 40 percent. Do you still not feel there is some reason for dissatisfaction with respect to the inordinately high cost of insurance?

Mr. LEMMON. Right.

Mr. ECKHARDT. It is for that reason I assume you offer a proposal in your testimony?

Mr. LEMMON. That is correct, sir.

Mr. ECKHARDT. Does your proposal envisage any kind of compulsory first-party insurance?

Mr. LEMMON. It leaves it up to the State legislatures, Congressman, whether the first party shall be mandatory. There should be a mandatory offering. If legislation would make this work a right of rejection if the person did not want this medical or hospital provision, they could reject it here.

Mr. ECKHARDT. What percentage of the insurance industry did you say you are speaking for the national association?

Mr. LEMMON. We write a little over half of the automobile business in this country.

Mr. ECKHARDT. Is there any reason you could not offer your proposed plan?

Mr. LEMMON. A number of our companies are in a number of States on at least half of the base on a voluntary basis. The other guidelines for pain and suffering take implementing legislation.

Mr. ECKHARDT. In other words, what you want to enact into law is a limitation on the recovery of the claimant with respect to pain and suffering; is that not right?

Mr. LEMMON. In the less serious situations.

Mr. ECKHARDT. You are not saying that cheaper insurance should be offered. You are talking about extending more insurance without coverage; are you not?

Mr. LEMMON. Let me answer it this way: The DOT's major criticism has been that we were overpaying small claims. I do not know if that means that the seriously injured are not getting enough. We tried to be responsive to that area. This \$20,000 will cover over 90 percent of the medical claims. The wage loss, \$6,000 to \$7,500, is better than for most.

Then it does restrict this man to suing the party at fault. His first-party coverage is offset against his costs.

Mr. ECKHARDT. Are you saying he can recover under his own tort contract?

Mr. LEMMON. Subject to these limitations.

Mr. ECKHARDT. Subject to subrogation?

Mr. LEMMON. That is right.

Mr. ECKHARDT. Where do you cut out any attorney's fees? He goes in and gets paid by his company. His company pays him off or maybe does not pay them. When the case goes to court, he has his own attorney in that court and you are trying to recover the amount from the tort "feasors." Now, where do you take any attorneys' fees out of this case? It is like the previous case where you have to cut lawyers' fees out from the premium dollar.

Mr. LEMMON. The dual protection plan provided for intercompany arbitration on those situations. The Philadelphia plan will arbitrate all plans up to \$33,000.

Our theory behind the limitations on pain and suffering say a man has a \$250 or \$300 or \$500 medical bill. He has some pain and suffering. In cases of dismemberment, total disability, anything the court might consider to be against the reasonable conscience of men.

Mr. ECKHARDT. Do you have any evidence in any jurisdiction where you have offered this plan, that there is a reduction in rates as a result of it?

Mr. LEMMON. It is too early to tell because no State has passed this, because the reduction comes about obviously by the payments on the pain and suffering aspects.

Mr. ECKHARDT. You would then get two advantages, from the insurance company's standpoint.

Mr. LEMMON. All our experience is based on loss experience; and if it reduces the cost as we believe it will in the system, obviously we will give a reduction in rates.

Mr. ECKHARDT. You still have all of your litigation built into the plan. The reduction as between your arbitration and your receiving your claim against the defendant as a result of the lawsuit, but also reduced because of the reduction in pain and suffering. Are those the only two items?

Mr. LEMMON. No, sir. I cannot give you an Oklahoma guarantee on any of these plans, but it seems to me if you pay the claimant, if you pay the injured person, pay his hospitalization expenses, out-of-pocket expenses and out-of-work payment, then you take a lot of the stink out of the system, and he is not as prone to go to a lawyer and try to get additional costs.

Mr. ECKHARDT. If he does not go to a lawyer, he is not likely to get his money either, as many of us have seen from past experience.

Mr. LEMMON. I hear both sides although there are cases of all types of liability cases in the country, and 49 percent are settled without going to court, and only 2 percent are ever actually tried.

Mr. ECKHARDT. It is that 2 percent that keeps the level up.

Mr. LEMMON. No, sir.

Mr. ECKHARDT. Do you think the insurance company out of the graciousness of its own heart would keep the level up, even with the opportunity to sue?

Mr. LEMMON. I say good lawyers like you in Houston require settlements.

Mr. ECKHARDT. I should say we have. The Essex bill has been in effect, and I have not practiced in this field at all since I have been in Congress, but we did increase the amount of settlements somewhat by efforts, I like to hope.

Mr. LEMMON. I would think that is what every attorney should strive for. Mr. Mertz here is a lawyer.

Mr. MOSS. Mr. Eckhardt has to leave for a vote.

Mr. McCOLLISTER.

Mr. MCCOLLISTER. Speaking on the subject of cost, there has been a lot of testimony indicating that no fault would lower cost. Would you have any comment on that?

Mr. LEMMON. It is easy to cut rate if you cut protection. It is just that simple, and you cut out benefits.

Mr. MCCOLLISTER. Is there something more than that?

Mr. LEMMON. Our actuarial people worked for months and months and months, and a lot of plans advanced, we are convinced by our actuarial studies, will not produce the reductions called for that have been advertised.

We believe the bill before you now will actually increase rates. We have made actuarial projections that lead us to that belief.

Mr. MCCOLLISTER. Is that part of your testimony?

Mr. LEMMON. No, sir; it is not.

Mr. MCCOLLISTER. Mr. Chairman, could we have that?

Mr. MOSS. The Chair would certainly join in the request that they be made available to the committee, but I would want to have the committee check the figures before we placed them in the record.

Mr. LEMMON. Do you want both of them?

Mr. MOSS. I think whatever you have in the way of actuarial figures indicating the cost of the program would be of interest.

(The requested material had not been received at the time the record was printed.)

Mr. MCCOLLISTER. In our conversations as we tried to establish the point at which no-fault then reverts to the threshold and then becomes a fourth proposition, it has been suggested by Secretary Volpe and others that there be some minimum standard considered. What would be your comments regarding minimum standards in a Federal bill?

Mr. LEMMON. I think that starts the journey down the long road to Federal regulation. It is a very indirect form, if not a direct form, of Federal legislation and regulation. We would certainly not be in favor of adopting Federal standards in this field. We think this can be done at the State level, and we think the States will respond.

You are from Nebraska, I believe. They have a study committee there which has been appointed since the Volpe statements have come out. So, attention is being given, but specifically we would not favor Federal standards.

Mr. McCOLLISTER. In Nebraska, do you know by whom that committee was appointed?

Mr. LEMMON. I think it was recommended by the insurance director and I believe implemented by legislative action. There is a committee of government officials, citizens, like a lot of States have, a committee of citizens.

Mr. McCOLLISTER. Thank you, Mr. Chairman. I have no further questions.

Mr. MOSS. Mr. McCollister, we will have the staff contact the 50 States to determine the type of commissions which may have been established for the purpose of studying the staffing of those commissions and the budget allocated to their operation.

Mr. LEMMON. Many States actually have actual legislation on the books.

Mr. MOSS. I am aware of that, but I would not want to hold my breath until they pass it.

Mr. LEMMON. We have a couple of programs in Michigan and Illinois, and we have submitted it to California. From this Secretary's report, I do not know if they developed their own plan.

Mr. MOSS. My conversations with members of the California legislature would not lead me to be too optimistic about the outcome for the insurance companies. I was contacted the night before last on this.

Mr. GUTHRIE.

Mr. GUTHRIE. You mentioned that some of your writers are some of the largest. Could you name some of them?

Mr. LEMMON. State Farm supposedly is the largest in the country, and they are, Allstate, Government Employees, Surrey, Nationwide, United Services Automobile Association.

Mr. GUTHRIE. They are selling about 40 percent of the insurance market today.

Mr. LEMMON. In the aggregate they are.

Mr. GUTHRIE. I note Allstate and State Farm are the largest, and have been for years.

Mr. LEMMON. Yes, sir.

Mr. GUTHRIE. We had testimony the other day which dealt accidental health policies which are amenable to sale on a group basis. Now, would this undercut the apparent competitive advantage of your member companies in going over to this system of sales?

Mr. LEMMON. Are you talking about group merchandising now?

Mr. GUTHRIE. I did not know that that was the subject of this hearing.

Mr. MOSS. Comment on the questions as they are put.

Mr. LEMMON. I did not come prepared for this.

Mr. MOSS. If you are not prepared, you can tell us you are not prepared.

Mr. LEMMON. On the group end of it, I know there is a bill here and one on the Senate side to repeal some of the laws and we would favor the State regulation in that area, and many States already do have laws already governing—

Mr. GUTHRIE. You are not prepared to say that going to a no-fault system would facilitate going to a group or mass basis?

Mr. LEMMON. I doubt that it would facilitate it, Mr. Guthrie. Many of our people, as you named, including a good many others, sell in all

of the group plans that have been advanced. The only thing I have seen come out of these have been cutting out the agency fees substantially. We have a number of companies that are providing policies at a closer range than the group.

Mr. MERTZ. What we have submitted to the FTC on this might be helpful on this point. I think the point Mr. Lemmon was going to speak to was that the no-fault concept might lend itself to a group, but it is our feeling that it might not produce a trend in that direction as much as some might suppose. In that document we set forth some of the reasons for that and we would be pleased to supply it.

Mr. GUTHRIE. Is this the material submitted by your association?

Mr. MERTZ. There were several submissions and I forget which ones.

Mr. GUTHRIE. There was some material submitted for the record this morning.

Mr. MERTZ. It may have been in the documents that you are talking about.

Mr. GUTHRIE. This was submitted for the purpose of the record by the witness, Mr. Jacob Clayman, this morning. (See p. 680.)

Mr. MERTZ. Is that a complete statement?

Mr. GUTHRIE. It purports to be a filing by the trade association with the subject being price and availability in the market, fault versus non-fault schemes.

If there were an overriding fear on the part of our companies that moving into default would give someone a better competitive advantage and then probably we would not have approved our program there. We are talking about no-fault coverage that is going to cover something like 90 percent of the accidents. It is an underlay.

Mr. MERTZ. Yes; if no-fault lends itself to group, it is a matter of degree. I would really point out we are not letting that stand in the way of the situation if it is practical.

Mr. GUTHRIE. I note in your statement, and it has been called to my attention, where you say: "All underwriting would be banned, including consideration of such matters as fraud, misrepresentation, illegal enterprises and activities, habitual drunkenness or dope addiction, or long-standing record as a scofflaw and a highway menace." Could you elaborate upon that statement.

Mr. MERTZ. As we see that bill, the only limitations are paying premiums and having a driver's license.

Mr. GUTHRIE. But you can, certainly, take these factors into consideration insofar as they bore some relationship to expectancy of accidents, in putting surcharges on premiums, could you not?

Mr. LEMMON. These people should not have a driver's license in the first place.

Mr. ECKHARDT. What is the scofflaw law?

Mr. LEMMON. Old-fashioned bootleggers, but there are not very many of them anywhere.

Mr. GUTHRIE. Is there any kind of presumption on the basis of age or lack thereof?

Mr. LEMMON. No. I don't think so.

Mr. MERTZ. Mr. Guthrie, I think we fall into the trap of using trade terms and it should be made clear that we are talking about the right of a company to insure a risk. We are not talking about the matter of rating charges or whether you would or would not have to insure

the risk. Of course, it is often assumed that we can charge any rate the companies want but that is something that does not turn out in practice.

Mr. GUTHRIE. The bill makes no effort to regulate rates. As far as rates regulated by the State, they will continue to be regulated.

Mr. MERTZ. We are thinking of the situation where a small company, for example, has to, in effect write anybody who comes in, and we recognize there was an escape hatch placed in the bill. We allow for the purpose of that.

The problem is when you are solvent enough to take individual risks, an individual company, to get into a lot of trouble. Now we have never suggested people should not get insurance. That is where the insurance plans are provided. Rather than saying to everybody you have to take in anyone who comes in and keep on writing them—

Mr. GUTHRIE. What are the merits of having a pool taking over people as they come in?

Mr. MERTZ. It is a matter of capacity. How many risks can it take on? It has to have a certain amount of surplus. It is just like the Government keeps surplus to back up things. That is capacity. After all, the insurance departments do not allow the companies to write more than a certain amount of premiums.

Mr. MOSS. Mr. Ware.

Mr. WARE. In this connection, is reinsurance used in this type of automobile coverage by the industry?

Mr. MERTZ. Yes; but that does not help the capacity problem.

Mr. LEMMON. It would be too expensive to use it on an individual's private passenger car.

Mr. WARE. It is limited more to fleet operations?

Mr. LEMMON. It refers to certain catastrophic provisions. It does not go out on the individual, private car.

Mr. MOSS. I have just a couple of questions on page 13. In reading your statement, you referred to the record of the States in protecting insureds from cancellation.

Mr. LEMMON. Yes, sir.

Mr. MOSS. What is the record of the States in protecting the insureds from cancellation, establishing a right of renewal?

Mr. LEMMON. I believe as of October 1970, and I understand they have called in two or three more States now that have laws and or regulations governing the cancellation—

Mr. MOSS. Laws or regulations governing the cancellation?

Mr. LEMMON. Right.

Mr. MOSS. They give you a legal basis to go ahead and cancel: is that not right?

Mr. LEMMON. Only for certain serious situations.

Mr. MOSS. In all instances or some more serious situation? Are some more reasonable?

Mr. LEMMON. Some of them are very restrictive.

Mr. MOSS. Quite a number of your firms have rather active policy cancellations, do they not?

Mr. LEMMON. I doubt it. Mr. Chairman, because we are writing more business than there have been new cars registered.

Mr. MOSS. I do not question you are writing more business.

Mr. LEMMON. Let me give you an illustration from what we learned from a survey. In an adjoining State here, cancellations and so forth, only 1.4 percent of the policies were concerned. In Virginia, we made a survey of 10,000 policies written by our member companies and only four out of every thousand renewal policies were nonrenewed and only two out of every 10,000 policies written by our companies were canceled.

Mr. MOSS. That is a spot survey of your organization?

Mr. LEMMON. No.

Mr. MOSS. You just said we made a survey and that is why I asked the question.

Mr. LEMMON. I am sorry.

Mr. MOSS. If you made it, that is one thing.

Mr. LEMMON. We have made our own surveys before the States got involved but here is the Wisconsin Legislative counsel. I would like to file this, and California has been active on this. A lot of California has been filled out without the need for showing cancellations. I know people have been canceled. So, if the law provides them protection, it is not working.

Mr. MOSS. We will make a little survey of our own of the States having protection by State laws with respect to cancellations. We will have that available for the members of the committee.

I do not think I have any further questions.

The next witness will be Mr. T. Lawrence Jones, president of the American Insurance Association.

STATEMENT OF T. LAWRENCE JONES, PRESIDENT, AMERICAN INSURANCE ASSOCIATION; ACCOMPANIED BY JOHN N. REID, ASSOCIATE GENERAL COUNSEL, AND DALE R. COMEY, ASSOCIATE ACTUARY, HARTFORD INSURANCE GROUP

Mr. JONES. Mr. Chairman, I would like to have two of my colleagues join me here at the table.

Mr. MOSS. Certainly, whomever you would like.

Mr. JONES. The first gentleman here on my right is John N. Reid, who has had broad experience in preparing no-fault laws for the various States. He is the principal one in charge of trying to put together our own no-fault law, and he is on draft 10A.

The other gentleman accompanying me is Mr. Dale R. Comey, who is with the Hartford Insurance Group. He is an actuary there and he is chairman of the American Insurance Association's actuarial committee. As you will notice, Dale is a young man, but still in age he is one of the senior men on this committee. We have a very able group of young actuaries who have been working on the pricing of these various plans and our plans and expectations as to what changes occur. A lot of people will tell you it is very difficult and we will agree it is very difficult, but we have some very able men on it and they are doing a very fine job. We understood your committee has expressed interests in costs.

Mr. MOSS. We are most interested in costs.

Mr. JONES. I would like also to say that Mr. Melvin Stark, who is our vice president for Government affairs, and located here in Washington—and I believe your committee and staff are acquainted with Mr.

Stark—is also here today and he is available to help the committee with any additional information you may want. Mr. Elver Pearson, manager of our Washington office, is here today and will be available to work with the committee and the staff at any time.

Mr. Moss. We thank you for that.

Mr. JONES. My name is Lawrence Jones and I am president of American Insurance Association, an organization of insurance companies writing all kinds of property and casualty insurance, including approximately 30 percent of the Nation's automobile insurance business.

American Insurance Association has for several years been a strong proponent for major auto accident reparations reform. We are, therefore, most pleased to have this opportunity to appear before this committee and present our views on H.R. 7514, which is the latest version of the National No-Fault Motor Vehicle Insurance Act, introduced by Representative Moss.

There is no need to state the case for comprehensive reform. Professors Keeton and O'Connell were among the first in recent years to expose the tragic failures of the present state of affairs. They were the first to present a detailed plan for change. American Insurance Association's special committee on automobile accident reparations completed a year-long study in October of 1968 and at that time made public a report calling for a complete no-fault auto accident reparations system. Last year the New York Insurance Department report "Automobile Insurance . . . for Whose Benefit?" impressively documented the case for reform and presented what we believe is an irrefutable case for total change.

Finally, we have had the DOT studies and its recommendation. Again, the case for major reform is convincing and compelling.

In our judgment the great debate has ended. I cannot help but note, Mr. Chairman, that my colleague who preceded me does not seem to agree that the debate has ended, but in our judgment the question between fault and no-fault has really been settled on the basis of the evidence that is before this committee and before the Congress, and we are making every effort to put this before the State legislatures.

It can no longer be seriously contended that the auto tort liability system must be maintained. As we see it, the area of discussion has narrowed. There are two issues before us. One, should we seek change through State or Federal action? Two, how extensive should the change be to meet the pressing needs of the public?

I would like to address myself to these two questions.

STATE VERSUS FEDERAL

Obviously, H.R. 7514 and similar bills are based on the premise that Federal action is necessary and desirable. When American Insurance Association's study was completed in October of 1968, our special committee in its report stated:

The committee in its deliberations has assumed that a revision of the present system would be achieved at the State level. This would give an opportunity to test and observe a no-fault system in actual operation. The committee notes, however, that Federal action to achieve uniformity and countrywide application is a possibility.

That was in October of 1968. At that time, American Insurance Association had not developed a policy position on the question of whether there should be a State or Federal solution, although all our deliberations were on the assumption that reform could and would be achieved at the State level.

I hope the chairman of the committee will understand that. We are a State-regulated business. We just operated on that principle. We think in terms of it.

Mr. Moss. I think it is a very valid premise.

Mr. JONES. In recent months, we have considered specifically the roles of the State and Federal Governments. American Insurance Association believes that the States should be afforded an opportunity to enact real no-fault auto reparations laws.

We have no specific time limitations. In our opinion, the sooner the better. It would be extremely beneficial to have the experience of working with a substantial no-fault law at the State level before establishing a national pattern. This is one of the advantages of our Federal system and it would not be wise to discard this opportunity for laboratory experimentation which is available through the States. The knowledge and expertise gained under a State law will be invaluable in formulating a smoothly working system.

Although one could argue that the threat of Federal legislation might spur the States to action, it could have just the opposite result. If major proponents for change were to shift their support to a Federal statute, State legislatures might conclude that the pressure for change was no longer on them to provide at the State level much needed reform. It would be an easy out and would be a way for them to avoid what so many legislators believe is a necessary but uncomfortable task.

We have actual experience that causes us to feel this way. I appeared in executive session before the Raymond Commission which was appointed by the Governor of New Jersey, Governor Cahill. I want to say that they have a very fine, objective, and open-minded chairman, but, although I have not become acquainted with all of the members of the committee, I have found those characteristics among the other members thus far nonexistent. Two of the members asked, "Isn't the Hart bill going to pass? Do we really have to do anything?" That was back in the fall and there have been no hearings. We had no expectation that this was the case, and we strongly argued that the State and the commission should address their attention to this, that they could not rely on that, and it disturbs us. Those who we feel do not really want no-fault at the State level are saying that they are going to wait until the Federal Government provides it.

Mr. Moss. I think it might be of interest, if you did not see it, to look at the Journal of Commerce of April 26. The State insurance commissioner of the State of New Jersey, Robert Clifford, said that New Jersey could not operate a no-fault system unless all of the States around it had a no-fault system because of the fact that it was a corridor State. He was speaking before the Ironbound Manufacturers Association at the time of making his statement.

It would appear that there is somewhat of a tendency there to abandon any effort without assurance of movement by the other States.

Mr. JONES. New Jersey has been disappointing to us because the press strongly supports change, and when the Governor announced

the commission we developed a certain amount of hope about the situation there. There had been some legislative interest in our type of legislation. There has been a fine independent public interest group that has activated some leaders in the State. We felt a lot of factors were there that should bring about early legislation, but there are also some blocks.

Of course, there are drawbacks to the State approach. First, there is the possibility that the States will not act. The record of the past 3 years is not impressive. I have brought with me a copy of that record that I would like to introduce.

Mr. Moss. If there is no objection, the material will be received for inclusion in the record immediately following the completion of your formal remarks. Is there objection? Hearing none, it is so ordered.

Mr. Jones. Only Massachusetts has enacted reform legislation and its law is a modest first step. On the other hand, there is no assurance that auto accident reparations legislation will pass the Congress and be approved by the President. I say this despite the fact that there appears to be much more support for no-fault auto reform in the Congress than we anticipated several months ago. Still, reform will be vigorously opposed at every turn by the same forces, which have the additional argument that the Federal Government is invading an area of accident reparations heretofore not dealt with by the Federal Government.

The other possible drawback to a State-by-State approach is the chance that we may end up with a pattern of legislation which will differ markedly from State to State. This would be unfortunate. It would be inefficient and expensive to administer no-fault programs if they varied substantially. In fact, they would be beyond the capacity of our computers, which we are incorporating now and which are very important in terms of cost savings. However, it should not be assumed that we will have a hopelessly diversified pattern of State laws. This did not occur when State financial responsibility laws were enacted. These laws, while differing in some important details, are compatible and in fact they are conspicuous for their high degree of uniformity. Even the three States with compulsory laws—Massachusetts, New York and North Carolina—are well-coordinated with the financial responsibility laws of the other States.

In the final analysis, the Congress can act if the States either fail to act at all or produce an unworkable statutory patchwork. We do not rule out ultimate Federal action depending on how well the States respond to the public need for a satisfactory auto accident reparations system throughout the country. If the States falter, I can readily visualize our strong support for Federal legislation.

In short, we urge that the States be given the opportunity to enact sensible reform legislation. If they do not meet the challenge, then it will be time for the Congress to act.

EXTENT OF REFORM

American Insurance Association developed and supports a complete program for automobile accident reparations reform. Our bill replaces the present auto tort liability system in toto. In that respect, it is similar to the reform measure proposed by the New York In-

insurance Department and endorsed by Governor Rockefeller. Sometimes we have been accused of intransigency, but we continue to believe our proposal does achieve maximum reform; it has withstood sniping from the status quo stalwarts who have persistently but unsuccessfully sought to demolish it. Our espousal of complete reform does not mean that we cannot accept and endorse proposals which fall short of our model. We believe that H.R. 7514 and similar bills in the Congress offer substantial and desirable reform. American Insurance Association can support at the State level legislation which closely follows H.R. 7514. Our support of this kind of State legislation would be subject to certain amendments which we believe are necessary. We will briefly discuss those amendments.

AUTO INSURANCE BENEFITS PRIMARY

Under H.R. 7514 net economic loss benefits are reduced by the amount of any benefit from other sources unless the other insurance or other source of benefits contain explicit provisions making its benefits supplemental to those paid under a qualified no-fault policy. This means that the auto insurance benefits under the bill are secondary to other benefits. We believe that the bills should be primary in order to achieve efficient administration of the insurance system. If such benefits are primary, they will be paid promptly by the auto insurer upon the determination that there has been an auto accident. This is simple and easy. That is an objective fact and one that can be easily checked. It will avoid costly and time-consuming administrative work in ascertaining what other benefits may be available to the injured person. Making auto insurance primary will also greatly simplify the process of classifying motorists for rating purposes.

Further, if other sources of benefits are primary, i.e., deducted from auto insurance benefits, it has the effect of transferring the costs of automobile accidents to nonmotorists. In our judgment, it is wrong to spread the cost of automobile accidents over other forms of insurance. Those who generate costs should bear the costs. The way to assure that this will be achieved is to make auto insurance benefits primary and not disperse the cost of auto accidents through other insurance and benefit systems. I believe the economists call this the internationalization of costs.

I would like to discuss here, if I may, the case presented this morning for making automobile insurance secondary based on the greater efficiency of the other systems. I would like to reply that the answer to that is to make automobile insurance efficient, to achieve the same degree of efficiency and the same type of return on automobile insurance that you receive on health insurance.

We, of course, do not favor duplication of benefits. Other systems can readily adapt to an auto reparations system which is primary.

PROPERTY DAMAGE

H.R. 7514 does not include property damage. Thus, it retains the tort system in an important area of auto accident claims. This means that almost every auto accident will have to be investigated—an

expensive process—to determine liability. Obviously, important potential savings will be lost.

In our opinion, the bill should not be saddled with the added burden of retaining property damage tort claims.

REJECTION AND NON-RENEWAL

H.R. 7514 places severe prohibitions on insurers with respect to rejecting an applicant for insurance and the right not to renew a policy. No insurer would be permitted to reject any applicant for insurance. The only exception is where the domiciliary State insurance supervisory authority finds that the company's solvency would be impaired by writing additional policies. This exception is not available in the case of policy renewals.

These provisions might be acceptable if incompetent and reckless drivers were removed from the road, but in real life this does not happen. In our judgment, these provisions are far too severe and should be eliminated. Under a no-fault auto insurance system, companies should be able to underwrite all risks much more knowledgeably than is the case today because they will be able to measure the loss potential of each driver.

The industry recognizes its obligations to provide completely adequate coverage to all licensed motorists who cannot be readily insured in a voluntary market. The rejection and nonrenewal provisions of H.R. 7514 are not the way to assure that each licensed motorist will be afforded adequate insurance coverage.

POLICY FORMS, RATING CLASSIFICATIONS AND TERRITORIES STATISTICAL PLANS

H.R. 7514 bestows on the Secretary of Transportation enormous powers with respect to policy forms, classes of risks and rating territories. It also gives the Secretary extensive control over the kinds of statistics companies can compile and requires detailed reports to be made to the Secretary.

Clearly, these provisions would be inappropriate if the bill were to be used as a model for State legislation. However, looking at the bill strictly as a Federal no-fault auto reform measure, we believe these provisions should be eliminated. As we view these provisions, insurance companies would be subject to both Federal and State regulation of policy forms, rating classifications and territories and of the premium rates charged to policyholders. From any standpoint, this confusing overlapping of regulatory authority is unsound. It should also be noted that regulatory provisions of this nature in a Federal no-fault bill will play into the hands of the defenders of the status quo. They will be able to point out that these provisions raise again the specter of Federal regulation of the insurance business. Auto insurance reform is too important to be burdened with any nonessential issues.

FUTURE OUTLOOK

The rate of progress for reform is always slow. If we examine the balance sheet, there have admittedly been disappointments. High on the list would be the silence of many leaders of the bar who pri-

vately support major reform. Over the years some outstanding lawyers have chided the insurance industry for not espousing a better auto accident reparations system. Now that important segments of the insurance industry are advocating such reform, it would help a lot to have their vocal support.

Another disappointment has been the judiciary. We have in mind their apparent unwillingness to see any connection between the horrible delays in our criminal courts and the amount of court and judge time expended in the processing of personal injury auto accident suits. This is an unbelievable example of burying one's head in the sand.

We sincerely believe the automobile accident cases are really an abuse of the judicial process. They use the judicial process merely as an extension of the bargaining system and the issue is normally just how much they are going to pay for damages and they continue their bargaining as they go through a jury selection and those things.

There have, of course, been a few shining exceptions. These lawyers and judges are to be commended for their intellectual integrity and willingness to speak their minds. These are qualities which one would normally associate with the legal profession.

In that respect, New Jersey does stand out. On the other hand, Mr. Chairman, I would like to introduce before the committee an editorial from the Minneapolis Tribune of April 22, 1971, which describes a publication distributed by the Minnesota Bar Association as grossly inaccurate. It says the pamphlet goes on to make three other serious flat misstatements of facts and at least two clearly misleading assertions, giving the pages. Being a member of the legal profession, one cannot take any satisfaction from this kind of activity.

Mr. Moss. Is there objection to the request to include the editorial in the record immediately following the statement? Hearing none the article will be included.

Mr. JONES. On the brighter side, we are heartened by the ever-growing support for no-fault auto insurance. The newspapers and all other news media have been overwhelmingly favorable. In increasing numbers, legislators, even those who are lawyers, now admit that some kind of change is near at hand.

The outlook for change has been greatly helped by the DOT studies. The interest of this committee and the Senate Commerce Committee has been a major contribution to the growing support for reform. We would expect that the interest of these two congressional committees will continue and will result in careful evaluation of the response of the States.

As mentioned earlier in our statement, we believe that the States should have an opportunity to enact effective auto accident reparations legislation. But we repeat, this does not mean that we believe there is no role for the Congress. In fact, it is abundantly clear that the Congress must act should the States prove incapable of providing the kind of no-fault auto accident laws which meet the criteria of genuine reform and substantial uniformity. Thank you.

(Mr. Jones' statement before the Senate Commerce Committee's Antitrust and Monopoly Subcommittee and attachments, follow:)

**STATEMENT OF T. LAWRENCE JONES
PRESIDENT, AMERICAN INSURANCE ASSOCIATION**

**THE SENATE ANTITRUST AND
MONOPOLY SUBCOMMITTEE**

December 15, 1969

THE AMERICAN PUBLIC deserves a better automobile insurance system than it has today — one that will be available to all people; one that will provide payments promptly and as expenses are incurred; one that will provide rehabilitation and productive contribution to society; and, one that will have more reasonable costs, fairly allocated.

* * * * *

My name is T. Lawrence Jones, and I am president of the American Insurance Association, an organization of insurance companies writing all types of property and casualty insurance throughout this country. Our member companies have an annual premium volume of over \$7 billion and they write approximately 30 per cent of the nation's auto insurance business.

As my opening paragraph indicates, our member companies believe that fundamental changes in the existing automobile liability insurance system are necessary and in the public interest. We therefore welcome this opportunity to present the results of our analysis of public dissatisfaction with the present system and our recommendations for a product that the country has never had — a true auto accident reparations system that will bring benefits to everyone who suffers loss through automobile injury.

At the outset, I wish to state our conviction that the American auto insurance industry has the knowledge, the capability and the desire to perform this job. All it requires is the appropriate changes in state laws to allow the insurance mechanism to function in the way it was designed, and that is to compensate for loss. If this can be achieved, we are confident that most of the causes of public complaint about auto insurance will be erased.

For more than a year now this committee has explored various complaints and dissatisfactions that the public has about automobile insurance.

Our Association, beginning in June 1967, has done the same.

You have shown particular interest in the following subjects:

1. Insurance company underwriting standards and practices, that is, concern that underwriting is not confined to a person's driving ability or record.
2. The availability of automobile insurance.
3. The cost-benefit relationships for the policyholder.
4. Automobile repair costs.
5. The tort liability system
6. Insurance company insolvencies.

These areas of public dissatisfaction that have come to your attention do represent real problems. In our opinion they are of sufficient magnitude to warrant a basic change in the way automobile insurance benefits are made available to the driving public.

For example:

Under the present system insurance companies must consider insurance factors other than a person's driving record to evaluate properly the element of risk that each individual represents. As a part of this, and in recognition of the fact that insurance for bodily injury and property damage liability to others accounts for 60 per cent of the total auto insurance premiums paid by the nation's drivers, the companies — for indemnity purposes — must consider what kind of a defendant each policyholder would make should the company have to defend him in a liability suit.

This may not be regarded as particularly just but it is an inescapable by-product of the tort liability system. It is easy to see how this leads rather naturally to the underwriting judgment that some people will be easier to defend than others. And this — for underwriting purposes — unfortunately leads to the reluctance of some insurers to make auto insurance available to young people, minority groups and people with occupations that are judged to be in a less favorable light.

The availability of automobile insurance, like most products, is directly related to prices, profits and the basic laws of economics. Over the last 10 years the auto insurance industry in the aggregate has suffered underwriting losses of more than \$1.7 billion on liability coverages. Even those companies that have had the most dramatic financial success in providing auto insurance during that time have, in the past two years, watched underwriting black ink change to red with alarming speed and intensity. This 10-year financial performance suggests that there is something fundamentally wrong when we cannot make money on our biggest product even though there has been a steadily increasing public demand for it.

Influence of External Factors

A major problem, of course, is the fact that the cost of our product is determined largely by elements outside our control, such as the mounting cost of auto accidents, medical care, legal services and auto repair. These are largely "handicraft" industries where there is little increase in productivity to offset higher costs of labor and materials; that is, in economic terms, the employment of capital cannot effectively replace the employment of labor.

Therefore, inflationary factors, operating through these categories,

push up the so-called "loss cost" of auto insurance by some six and a half per cent each year, which requires a correlative increase in premiums to cover.

Naturally, as prices continue to rise, so does public resistance. This is understandable. But what also becomes a factor is that the costs of providing the auto insurance product cannot be reflected rapidly in the marketplace. This is the result of the regulatory system, in the largest number of states, which requires prior approval of insurance rates before they can be put into effect. Because of lengthy administrative procedures and, often, court cases, there is a substantial time lag between the filing of rate adjustments and implementation of them. The prior approval system, in short, has been unable to keep pace with actual economic changes. Prices have become inadequate in many states. Consequently, simple business economics dictate a decrease in supply of the product.

With regard to cost-benefit relationships for the policyholder we must candidly admit to a rather unflattering ratio. The simple fact of the matter is that the liability portions of the existing auto insurance policy are very expensive to administer.

The procedures necessary to determine legal "fault" include examination of the accident scene and the vehicles themselves, interrogation of witnesses, review of investigation by police officers, physical examinations, depositions, pre-trial conferences, and many other steps which take a great deal of time and cost a great deal of money. In essence, the same procedures are followed whether a case ultimately goes to trial or not, thus building high cost into the system.

Victims Get 44 Cents of Premium Dollar

The cost-building elements of this adversary system result in a return of premium dollar to the policyholder that is far lower than in other forms of insurance. Recent studies show, in fact, that auto accident victims receive net payments totaling only 44 cents of the auto liability insurance premium dollar.¹ The insurance industry itself is capable of operating efficiently enough to produce a greater return

¹Studies made and cited by Prof. Robert E. Keeton of Harvard Law School; see statement prepared for the Joint Committee on Insurance of the Commonwealth of Massachusetts, March 11, 1969. Prof. Keeton reports similar findings in studies by Frank Harwayne, Chief, Casualty Actuarial Bureau of the New York State Insurance Department and independent consulting actuary, the last supplement to which was issued in December 1968.

than that to the policyholder; the inefficiencies — and the inequities — arise from the liability system itself.

Regarding automobile repair costs, in recent, very extensive testimony before this Committee there has been some suggestion that insurance companies should give premium credit for the safe design or improved repairability of cars. Certainly, we would agree with and support the goal of such a plan — to provide as much incentive as possible toward auto safety and lower repair costs. I must point out, however, that such a plan is hardly possible under the existing liability system.

Under the present liability coverage, an individual's insurance policy pays for property damage sustained by others. Obviously, there is no way of foretelling with what kind of car any policyholder will become involved in a crash. So an insurance company will be unable to give the "safe design" credit and thereby encourage safe design unless property damage is put on a first-party basis, that is, where each policyholder is paid directly by his own insurance company for his own losses, and not for the losses of someone else.

In contrast, such "safe design" or repairability credits could be extended to collision coverage today, were the required data available, because collision coverage operates on a first-party basis.

Insurance company insolvencies also have been explored thoroughly by both your subcommittee and the Senate Commerce Committee. In my statement of November 19 to the Senate Commerce Committee, I outlined the position of the American Insurance Association in general support of S. 2236 providing for a Federal Insurance Guaranty Corporation.

Your invitation to us to appear here today specifically requests our views as to what changes are necessary in the present tort liability system to effectuate the complete availability of automobile insurance at a reasonable price, and as to what is the most just and efficient compensation system for all automobile accident victims.

It is here in particular that your inquiry coincides with the extensive study our member companies undertook nearly two and a half years ago. We have been seeking the same ends. And we find that the goals you set forth — *complete availability* of insurance at a reasonable price and a just and efficient compensation system for *all* auto accident victims — are plainly and completely incompatible with the auto insurance liability system as we know it today.

A growing number of scholars and consumer spokesmen have been saying that the existing system is no longer pertinent to the needs of a mobile society for a viable accident benefits system. We must agree. And we must further ask if the system is inadequate today, how will it

possibly meet the future needs of more people driving more automobiles more miles on more crowded roadways? We conclude that to continue with the auto liability insurance system is to court chaos.

Our Association attacked this entire problem by assessing public complaint as it had been registered to and by legislators and the press, and to insurance companies themselves. The defects of the present system, measured by this public criticism, were readily apparent:

1. Too few people recover for their injuries or economic loss.
2. Settlements are uneven, resulting in overcompensation of people with minor injuries and undercompensation of people with serious injuries.
3. Settlements are too slow on the average.
4. Settlements are vague, lacking in objective standards.
5. The system is too costly.

We traced each major criticism and defect back to what we think of as the twin cancers of the present auto insurance system — the principles of a fault concept and indeterminate damages. We call them cancers because they are alien, potentially fatal substances in the body of insurance. We saw that if these could be removed, it would be possible to design an insurance reparations system that would be more equitable, faster and less costly than the present one.

Basic Principles Summarized

Our Association then developed a set of basic principles for a model personal protection and reparations system, which can be summarized in this way:

1. Fault is not a proper factor to determine reimbursement for motor vehicle accident injuries under an insurance reparations system.
2. Pain and suffering are not susceptible to objective measurement and should not be included as such in a reparations system.
3. The cost of motor vehicle accidents should be borne by motorists.
4. Any system should be operated by the automobile insurance industry, with an opportunity for reasonable profit.
5. Any alternative system should cost less than the present system and should provide injured persons with a higher proportion of the insurance premium dollar.

In essence, our Association has pursued a system that will be most compatible with the true insurance function — that of compensating loss. We favor a "pure" auto accident reparations system that will be most consistent with the economic function of insurance in society. In

this case, that would be to spread the economic losses of auto crashes among all users of the highway and to spread them on the basis of probability, our true and historic role.

"Fault" and its Social Definition

In contrast with this, consider the system the insurance industry has been given to administer. The present auto insurance policy does not reflect a pure insurance system. Rather, it combines negligence liability, which results in a distortion of the insurance principle of risk sharing on the basis of probability. To satisfy negligence liability the system specifies that "fault" for a crash be determined, and that no insurance benefits be paid to the party judged to be "at fault" for injuries or damages to someone else. So, we are forced to deny insurance payments to the so-called "guilty" party. Thus, the negligence principle frustrates and contaminates the insurance principle of risk sharing.

"Fault" as that term is applied today has quite a different meaning than it originally had in our law. It does not describe conduct which is socially condemned or unacceptable. On the contrary, it is a technical concept employed whenever it is felt socially desirable to award damages to one person, and usually with the knowledge that those damages are going to be spread by the payor among many.

We also should remember that in the beginning of auto insurance, at the turn of the 20th Century when the horseless carriage was the play-toy of the rich, liability insurance was provided to protect the rich man's assets should he be held liable for causing damages to others. "Fault" also was relatively easy to ascertain in those days, but it is interesting to note that by 1932, less than 10 years after automobiles and paved roads appeared in any sizeable number, an objective analysis by a Columbia University study committee recommended abolishing the tort liability system in favor of an accident reparations system that would make payments without reference to fault and that would exclude compensation for pain and suffering.

The tort liability system, then, as applied to auto accidents, leads to avoidance of personal responsibility by utilizing the insurance mechanism. The principal parts of the auto insurance policy were designed as a shield against the consequences of legally irresponsible conduct. They were not designed as a way of compensating people injured in auto crashes for their losses.

Yet, in practice, that's what the liability coverages have become. Judges and juries have been telling us for years by their actions that they want to see everyone injured in an auto crash compensated for his

losses. Indeed, the tort liability principle has been stretched to allow benefits to be paid to more than 70 per cent of the people injured in accidents and to 98 per cent of the people who bring suit to recover for serious injury or permanent impairment.

Moral vs. Legal Responsibility

Thus, the insurance mechanism has been used to compromise the fault principle. A wrongdoer has a settlement made on his behalf by his insurance company and it is paid from the insurance fund to which everybody contributed. Claims personnel tell us that upward of 90 per cent of the people never know that their insurance company has paid a claim on their behalf — let alone how much money was involved. So there is little in the way of "individual responsibility" to talk about here. The fact is that there is no personal sanction in having a judgment against you when liability insurance will pay that judgment. Moral responsibility and legal responsibility are no longer synonymous!

Another example. An individual may be irresponsible in not carrying auto insurance and may be clearly responsible for injuring another driver who is insured — but the insured "innocent" driver can't collect. The existing system does not encourage "individual responsibility" in such cases. Or, an uninsured driver may get "something for nothing," in effect, if he collects an insurance settlement from the pool created by people who did insure themselves. This, if anything, rewards irresponsible conduct.

Neither is a person held accountable for covering his own potential losses or those of his family who may be with him in a crash. What he gets basically is determined by the other person's policy limits and through the expensive, time-consuming, tawdry "game" called, "who's at fault?" So a man may be unable to protect his family in the way he would like. This also indicates a failure of the liability system to promote individual responsibility.

I do not mean to imply that people should not be held accountable for reckless or irresponsible driving. We have the means — and it is most proper — to provide for accountability through the law enforcement and penal systems. The job can be done in this way. Let us not confuse it with provision of an equitable auto accident reparations system.

Summarizing our objections to the requirement to determine "fault," then, we find it excludes, by definition, many people from auto insurance benefits; it leads to a substitution for individual responsibility and, it is the cause of great delay and high cost in paying insurance benefits to traffic victims.

The other cancer in the existing system is payment for indeterminate damages or dignitary harms, chiefly the so-called pain and suffering. This is the catch-all category of damages that introduces great evils and great expenses into the auto insurance system. Not without reason has it been said that awards for pain and suffering pander to the "jackpot urge."

As for expenses, payments for indeterminate damages, or non-economic losses, account for 58 per cent of each dollar of insurance benefits paid to claimants. This becomes particularly noticeable in the lower range of awards where people regularly collect three, four and even more than seven times their actual economic losses.³ Unfortunately, the people who are seriously injured and for whom payments for pain and suffering would be more just and more understandable are not the ones who receive these insurance bonanzas. Many of them barely recover their economic losses, even when awards for indeterminate damages are included.

Shortcomings of "Pain and Suffering"

We do not deny that pain is real or that people often experience substantial inconveniences as a result of an auto crash. The issue is whether dollars can remedy that pain, particularly dollars given long after the pain has gone. Even if one accepts the contention that dollars buy pleasure and pleasure compensates for pain, it is still important to weigh that dubious benefit against the evils that these immeasurable damages bring into the reparations system. Here are eight of those evils:

1. The system becomes discriminatory. Because pain itself is not measureable in dollars, the controlling factors become the status and appearance of the plaintiff and his ability to arouse the sympathy of the fact finder; the nature of the personal wrong; the character of the defendant (a corporate target or an inoffensive individual); race, nationality and ability of the plaintiff to communicate. Obviously, there can be great disparity between awards to two people suffering the same

³From its analysis of 11,000 auto accidents and 19,000 related injuries, the American Insurance Association found that in cases where claimants were represented by a lawyer in which the claimant had actual financial losses of \$100 or less (28.4% of the claims settled during the survey period), the claimant received a settlement that was 7.14 times greater than his actual loss, on the average. Those with actual losses between \$100 and \$200 received settlements averaging 4.48 times greater than actual loss.

injury and the same pain. As a matter of justice, is one man's pain worth more or less money than another's?

2. Because dollars cannot alleviate pain, they introduce a profit factor into the system. This creates the temptation for exaggeration, if not for outright fraud.

3. Dramatization of injury encourages over-utilization of medical facilities, which already are burdened, impeding recovery and creating psychological impact on the injured party.

4. Loss of respect for the legal profession for its role in helping build up the appeal of the plaintiff's case. Hence, the appellation "ambulance chaser."

5. A degrading of the medical profession, creating a whole class of doctors who are required to aid in the construction of the plaintiff's case.

6. A loss of respect for the courts and our system of jurisprudence. For many people, their only contact with the courts is an auto accident litigation, and they form the impression that all litigation is the same kind of "grand lottery."

7. The immeasurable nature of the element of damages actually encourages litigation, contributing to court congestion and thereby preventing our judicial manpower and resources from being used to better advantage in the *proper* handling of criminal cases.

8. The fact that they are the major cause of the rising cost of auto insurance. Instead of insurance costs rising in direct proportion to the increases in medical expenses and salary losses, they go up more, the result of the multiplying of those items by a factor for pain and suffering.

Highlights of "Pure" Auto System

In sum, our Association does not believe that the motoring public as a whole should have to pay for all of these evils, and we therefore recommend that an efficient and equitable auto accident reparations system should not include payments for pain and suffering as such. It can be made available as an optional coverage for those people who may desire it, but it should not be part of the coverages that form the backbone of a pure system of automobile insurance.

The system we would recommend, and our evaluation of alternative systems, are fully described in the Report of our Association's Special Committee on Auto Accident Reparations. I shall therefore present only highlights of it at this time.

All of the coverages we need are in the present auto insurance policy and they have been for several years. It is simply a matter of

rearranging and expanding them so as to be able to cover the economic losses of all people injured in crashes.

(The attached charts show how the existing auto insurance policy would be restructured to provide a "pure" auto insurance system, and the premium savings that would result.)

"No Fault" Is Nothing New

Actually, as far as our present automobile insurance policy is concerned, insurers have been coming toward a system of first-party, no-fault coverages throughout the 20th Century.³ This is not something new and radical. It is something virtually as old as the auto liability insurance policy itself. And in this evolutionary process, it is important to note that the coverages that provide for direct payment of benefits to policyholders by their insurance company are the ones that seem to work well and give little cause for consumer complaint.⁴

Our plan provides that a policyholder's own insurance company would pay all of the policyholder's medical and hospital expenses, including the costs of rehabilitation programs which we believe will be a major improvement in the best interests of society. There would be no policy limit on these payments. This change would remedy injustices under the present system resulting from inadequate policy limits.

³The basic bodily injury and property damage liability coverages date from approximately 1898. An early form of first-party physical damage coverage, or "fire, lightning and transportation," was available on the automobile in 1902. A first-party coverage against theft of a vehicle was provided in 1904, and coverage against collision and upset also has been available since the early 1900's.

Further evidence of evolution of the auto insurance policy toward first-party, no fault coverages is embodied in the provision of the Comprehensive Auto Insurance Package in 1932. Then, in response to public desire, the industry added medical payments coverage to the policy in 1939, enabling hospital and medical bills to be paid promptly without regard to a person's legal liability. After that—in 1955—came uninsured motorist coverage, a first-party coverage based on fault of a third-party. The final first-party coverage—death and disability—was added in 1956.

⁴"Consumers have long since come to accept the insurance principle as workable. We are comfortable with the idea of being first-party claimants. And things seem to work out fairly well. In Consumers Union's 1961 survey of readers, 95 per cent of respondents to automobile insurance questions indicated satisfaction with the way their insurance company had handled first-party claims."—Robert G. Klein, Economics Editor, *Consumer Reports*, speaking before the Annual Meeting of the American Insurance Association, May 20, 1969.

We also would pay for the policyholder's present and future wage losses, out-of-pocket expenses and costs of replacement services up to \$750 per month. Greater income loss protection would be available on an optional basis. Specifically excluded from our compulsory plan would be payments for pain and suffering as such, and any additional payment that may be made in cases of permanent impairment or disfigurement should be subject to objective measurement.

Our program would provide both a complete exemption from tort liability in any state enacting the plan, and appropriate liability coverage for policyholders should they encounter a lawsuit in a state that hasn't enacted the plan.

However, our plan also would preserve common law procedures, including the right to jury trial, for litigation of disputed claims. These would be issues between the policyholder and his own insurance company, and would no longer involve the somewhat remote insurance company of a third party.

Our pure auto insurance system would cover the car owner and his family for their loss in any auto accident and would also cover other occupants of the car and pedestrians who are not otherwise insured. An exception to this follow-the-family rule is that passengers in public vehicles would be covered under the policy on that vehicle.

Our plan also includes coverage for loss of or damage to property other than automobiles and their contents. The loss would be payable to the owner of the property as an additional insured under the motorist's policy. Motorists would assume the risk of damage to their own vehicles, but would be able to purchase physical damage insurance as an optional coverage — much as they buy collision coverage today. It is expected, in fact, that insurance companies will make a full range of optional coverages available to the motoring public.

Savings Would Be Substantial

This new auto insurance product and system that we propose not only will be superior to the existing ones in completeness, fairness, speed and efficiency; it will also cost the American motorist substantially less on the average than he has to pay today. Our extensive cost study and the work of independent actuaries such as Mr. Harwayne demonstrate that these substantial savings would be produced by both the plan we set forth and by the Keeton-O'Connell plan, which has been the foundation of an improved auto accident reparations system. This combination — a superior product at less cost — represents a breakthrough in service to the public — one urgently needed and desired.

Now, how will a "pure" auto insurance system help to answer many of the problems that you have explored?

In the first place, underwriting standards will be formed more specifically according to the policyholder's driving record and personal needs than they are today. More rational judgments can be made because the potential loss will be known to the insurance company at the time of application for a policy. Loss potential will include family usage of automobiles generally and, to some extent, the size of the family, but the number of cars in the family unit probably will be more important as a better measure of family exposure than the number of members in the family. By and large, the whole family does not accompany the driving commuter at the times of his greatest exposure to accident.

The greatest boon to less restrictive underwriting standards would result from elimination of the liability system itself, which also would eliminate the concern of underwriters that certain occupational groups will make poor witnesses or be uncooperative in the settlement of a claim against them.

Market's Improvement Seen

This will clearly improve the availability of auto insurance for people whose driving records are otherwise acceptable.

We also would expect the number of people in the assigned risk pools to decrease. Many are in them today because of subjective characteristics that are not ratable under the liability insurance system. Because many of these characteristics do not affect loss exposures under a pure insurance system, these people would be accepted voluntarily by insurers under a pure insurance system.

Otherwise, as far as underwriting is concerned, I should like to make it clear that the mature, defensive driver who is the standard risk or better today would be the standard risk under a system which does not require the determination of fault. Similarly, the driver with a record of accidents or violations, the chronic drinker or other driver who has an established accident record will continue to be a substandard risk.

Cost-benefit ratios will be vastly improved under a system such as we propose, with a greater return of the premium dollar to the policyholder.

Elimination of payments for non-economic losses like pain and suffering, or at least regulation of them according to determinable standards, would free a substantial portion of the claim dollars to be redistributed among claimants and policyholders.

A great percentage of the \$1 billion that is paid each year in attorneys' fees for the handling of liability claims could be saved.

Administrative expenses in the handling of claims would decrease markedly as a practical matter. To be conservative in recognition of new procedures, employee training, and the like, we have not even figured these savings into our cost estimates — but they are certain to result, especially after the initial period of operation.

A fourth category of savings will result from the elimination of overlapping coverage that now exists in auto insurance policies — where claimants have more than one policy covering the same loss, or where they collect medical payments under their own policy, for example, and get paid all over again under the other man's liability policy. Triple and quadruple recoveries for the same loss are not infrequent or unusual today.

We therefore estimate conservatively that we will be able to return in the neighborhood of 65 cents of the premium dollar to policyholders at the beginning, and we have every hope that that figure will rise to 70 cents after some experience is gained.

Encouragement for Safer Driving

As far as automobile repair costs are concerned, because the insurance company will be covering only its own policyholder's vehicle (like the existing collision coverage), it will be able to rate cars on the basis of repairability. For the first time, this also can be applied to personal injuries as well as to physical damage. In this way, insurers will be able to encourage safer driving through their classifications and insurance prices.

There are a few other benefits we foresee in a pure insurance system that eliminates the need to determine liability:

Under a "pure" insurance system such as we suggest, a person will no longer have to prove he was not negligent in order to be compensated for his medical bills and economic losses. He will no longer have to go to court to negotiate or haggle just to get his losses paid. This will simplify life for a lot of people.

By the same token, a person won't be depending on the other party to carry adequate liability insurance and to be at fault for a crash. He will be accountable to himself and to his family and the rest of the motorists by carrying his proper share of the risk. We think that is true accountability.

"Pure" auto insurance will help the man who earns less, because it will stop the sharp increase in insurance rates and speed up claims

settlement. It also should fully open up the insurance market to people with lower incomes, at least for the primary economic loss coverage.

It will help those who do not have extensive employee benefits, such as long term sick leave and disability pay.

"Pure" auto insurance will eliminate the difficult and sometimes impossible task of collecting from the uninsured motorist for property damage, or for bodily injury exceeding coverage under Uninsured Motorist Coverage. The uninsured motorist funds simply will become extinct.

"Pure" auto insurance will bring equal treatment of all policyholders, regardless of race, occupation or economic status, for a person will deal only with the company he selects as his own insurer, and not at arm's length with somebody else's company. And, no longer would a person, for protection purposes, have to worry about to whom a jury might choose to point the fickle finger of fault.

I believe it appropriate to call to the attention of this Subcommittee the very favorable response that our Association's proposal has elicited from the public, the nation's press, legislators, consumer group representatives and the academic community.

Support Seen as Favorable

There have been more than 300 editorials on the subject of auto insurance reform in the nation's press in the past year, an unusually large number for a business subject, and you can count on the fingers of one hand those that have commented adversely on our proposed auto accident reparations system.

Two public opinion surveys accomplished independently under tested market research techniques — one conducted nationally by Opinion Research Corporation of Princeton, N. J., and the other in the State of Illinois by the University of Illinois Survey Research Laboratory — have indicated in markedly similar results that people would prefer to receive compensation for their auto accident losses directly from their own insurance company without having to determine "fault" or engage in litigation. In the ORC Survey, 72 per cent of the respondents who expressed an opinion were in favor; in the Illinois Survey, 71 per cent of those expressing an opinion were in favor. In addition, a statewide poll by the *Minneapolis Tribune* resulted in the expression of public support for such a proposal by 67 per cent of the people who responded with an opinion. And just last month, in response to a nationwide public television broadcast debating the question, "Should we prohibit law suits over auto accidents and have each driver buy

insurance for his own injuries?" over 65 per cent of the 1,557 people who wrote in from 47 states favored the proposal, while only 28.5 per cent opposed it. Again, this is substantially the same ratio as developed in the aforementioned public opinion surveys.

Validity of Mail Poll Questioned

In contrast, one of the witnesses before you last week disclosed the results of a mail poll of the policyholders of one company, which would indicate overwhelming preference for the determination of fault as a condition of who should pay whom for injuries as a result of an auto crash.

Unfortunately, the validity of the results obtained is subject to serious question and doubt. The questions regarding fault made no mention of the uncertainty of payment accompanying the fault criterion. Neither did the questions reflect the considerations of cost, of delays or of the distinction between "cause" and legal liability which are very material to the issue. The State Farm survey itself, for that matter, demonstrates the pertinency of cost in the two questions which relate to payments for pain and suffering. In the one, 72 per cent of the respondents agreed with the statement that people hurt in a crash should be able to receive money for their medical and hospital expenses *and for their pain and suffering* (emphasis added). But the succeeding question indicates that fully 50 per cent of the total answering apparently would forego payments for pain and suffering if this would lower insurance prices.

Thus, while we commend the desire of State Farm Mutual to determine the opinions of its policyholders with regard to auto insurance, we must conclude that their noble intention suffered in the execution from an imbalance which undermines the validity of the responses. The people answering had no idea of the trade-offs and alternatives involved when they simply agreed or disagreed with the statements offered. It is significant that the *Minnesota Tribune* poll showed a complete turn-about in public opinion once such information was presented for evaluation.

In this regard, we wish to point out that in the survey conducted by the University of Illinois, people's preference for certainty of payment overrode not only the ethical question of paying without regard to fault, but also the fact — which was explicitly made clear in the question asked — that certainty of payment would be accompanied by lesser payments than are received today (reflecting elimination of general damages).

Our Association is tremendously heartened by the public receptiveness to automobile insurance reform and by the efforts to investigate and develop reform proposals that are being undertaken by public and legislative bodies throughout the country, as well as in the insurance industry itself.

We are all interested in providing a solution that is in the public interest. And in that regard, our Association has kept before us the public needs and desires as they have been outlined by a leading consumer spokesman:

One way or the other, we want insurance designed for the realities of the road. We want protection from serious financial losses in all highway accidents. We want insurance that returns the largest possible slice of the premium dollar in benefits. We want our claims settled fairly and promptly without legal travail. And we want to be treated as customers, not as supplicants.⁵

We concern ourselves with reparations and rehabilitation, not vengeance and vindictiveness. Let the insurance industry and system do the job for which they were designed and do best, and let the law enforcement and penal systems do the job for which they were designed and do best. Let's stop trying to drive a nail with a wrench instead of a hammer.

The American Insurance Association believes that the change that will provide the public with an auto insurance product best meeting their expressed needs and desires under modern driving and living conditions is a change to a pure insurance system where payments for accident loss are made directly to the policyholder by his own insurance company without having to resolve questions of "fault."

We respectfully urge that this body give our recommendations your most careful consideration, and we deeply appreciate this opportunity to present our views to you. We are confident that in the final analysis, the public interest will be well served by your consideration of substantial reform of our auto insurance system. We believe that reform is all but inevitable.

⁵*Ibid.*

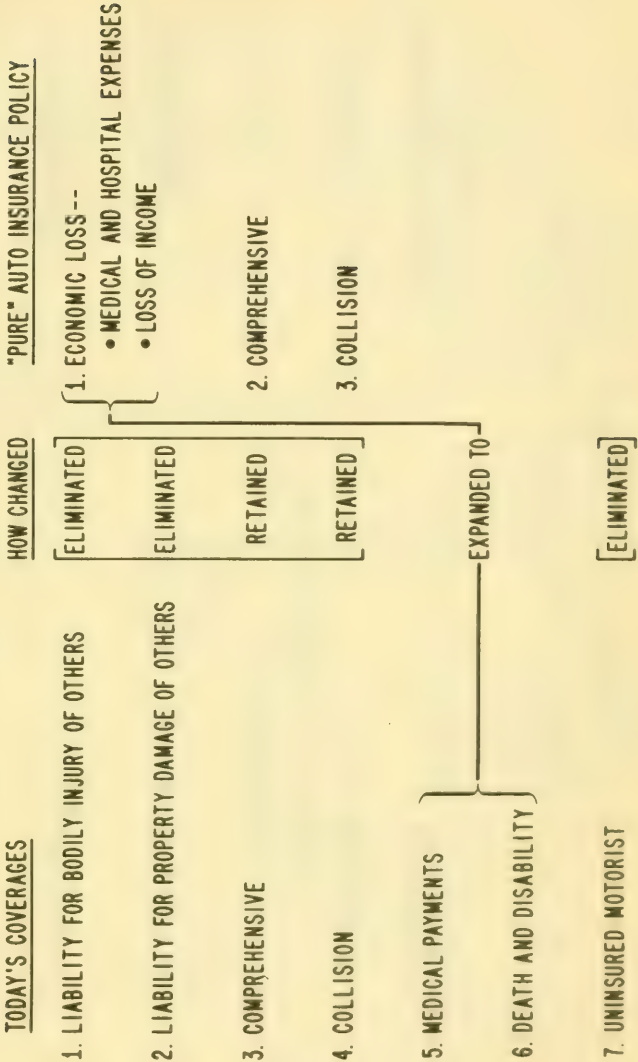
AUTOMOBILE INSURANCE POLICY

<u>1968 PREMIUMS</u>	
<u>3rd PARTY*; BASED ON "FAULT" OF INSURED</u>	
1. LIABILITY FOR BODILY INJURY OF OTHERS (1898)	\$ 4,457,000,000
2. LIABILITY FOR PROPERTY DAMAGE OF OTHERS (1898)	\$ 2,150,000,000
<u>1st PARTY*; NO QUESTION OF "FAULT"</u>	
3. COMPREHENSIVE-FIRE, THEFT, WINDSTORM, ETC. (FIRST, 1902; PACKAGE, 1932)	\$ 1,250,000,000
4. COLLISION-PHYSICAL DAMAGE TO YOUR OWN CAR (EARLY 1900's)	\$ 2,550,000,000
5. MEDICAL PAYMENTS OF INSURED (1939)	\$ 377,000,000
6. DEATH AND DISABILITY OF INSURED (1956)	\$ 15,000,000
<u>MIXED SYSTEM OF 1st & 3rd PARTIES; BASED ON "FAULT" OF 3rd PARTY</u>	
7. UNINSURED MOTORIST-PAYS INSURED FOR DAMAGES, HE IS UNABLE TO COLLECT FROM 3rd PARTY (1955)	\$ 176,000,000
	<u>\$ 10,975,000,000</u>

* 1st PARTY REFERS TO THE POLICYHOLDER;

3rd PARTY REFERS TO ANYONE MAKING A CLAIM
AGAINST THE POLICYHOLDER

HOW AUTO INSURANCE WOULD BE RESTRUCTURED
UNDER THE COMPLETE PERSONAL PROTECTION PLAN



ESTIMATED PREMIUM INCOME UNDER "PURE" AUTO INSURANCE

<u>COVERAGES</u>	<u>ANNUAL ESTIMATED PREMIUMS*</u>
1. ECONOMIC LOSS	\$ 2,814,000.000
• Medical and Hospital Expenses	
• Loss of Income	
2. COMPREHENSIVE	1,250,000.000
3. COLLISION	<u>4,042,000.000</u>
	\$ 8,106,000.000

* BASED ON COMPARABLE 1968
 AUTO INSURANCE PREMIUM LEVELS

NO-FAULT LEGISLATION PROPOSED IN 1969, 1970, AND 1971

1969

Legislation	Plan	Action
California:		
Senate Bill 116	Keeton-O'Connell plan	Hearing, Mar. 11; reported in Senate, Aug. 18.
Senate Bill 1141	Basic protection insurance	Hearing, May 26; reported favorably in Senate, Aug. 8.
Colorado: House Bill 1466	Keeton-O'Connell plan	Indefinitely postponed in House, May 6.
Connecticut: House Bill 6763	Modification of tort system	Hearing in House, Apr. 7.
Delaware: House Bill 335	No-fault personal and property protection.	No action.
Illinois: House 402	Keeton-O'Connell plan	Hearing, March 18; reported unfavorably in House, Mar. 18.
Massachusetts:		
House Bill 4439	do	Reported by substitute House 45 in Senate, Aug. 24.
House Bill 1909	Payments regardless of fault	Hearing Mar. 11; reported by substitute in House, Mar. 11.
House Bill 4440	do	Hearing Mar. 11; reported by substitute Senate 1284, in House, May 1.
Michigan: Senate Bill 1022	Keeton-O'Connell plan	No action.
New York: Senate Bill 2803	do	Do.
Rhode Island: House Bill 1144	do	Do.
Wisconsin: Senate Bill 204	do	Do.
Puerto Rico: Senate Bill 334 ¹	(Postponed date of A.A.S.P.A.)	

1970

Alaska: House Bill 809	A.I.A. plan	Reported favorably in House, May 16.
California:		
Senate Bill 797	do	Amended in Senate, Aug. 11.
House Bill 1450	Basic and added reparation insurance.	Hearing in House, June 10.
House Resolution 146	(Study proposal)	No action.
Congress: Senate Bill 4339	Hart no-fault proposal.	Do.
Hawaii:		
House Bill 1932	A.I.A. plan	Do.
Senate Bill 1812	do	Do.
Senate Bill 1959	State fund	Do.
House Bill 1334	Keeton-O'Connell plan	Do.
Massachusetts:		
House Bill 1928	A.I.A. plan	Reported by substitute Senate 1440, May 19, in Senate.
House Bill 610	Keeton-O'Connell plan	Hearing in House, Feb. 10.
House Bill 611	do	Reported by substitute House 1430, May 18, in House.
House Bill 6041	Benefits regardless of fault	Passed in House.
Senate Bill 1430	do	Substituted by Senate 1555, July 27, in Senate.
Senate Bill 1580 ¹	Limited no-fault program	
Senate Bill 500	Compulsory personal injury protection	Substituted by Senate 1430, May 18, in Senate.
New York:		
House Bill 842	Keeton-O'Connell plan	No action.
House Bill 6013	Benefits regardless of fault	Do.
House Bill 6133	New York Insurance Department Bill	Do.
Senate Bill 8849	A.I.A. plan	Do.
Pennsylvania:		
House Resolution 197	Study proposal	Do.
House Bill 2279	Constitutional amendment	Do.
Rhode Island: Senate Bill 791	Keeton-O'Connell plan	Do.
West Virginia: House Concurrent Resolution 8-XX.	Study proposal	Adopted in House, Aug. 21; died in Senate.

1971

Alaska: House Bill 25	A.I.A. plan	Reported in the House.
Arizona:		
House 316	Massachusetts plan	No action.
House 217	Cotter plan	Do.
California:		
House 117	No-fault benefits	Do.
House 1030	Massachusetts plan	Amended and recommitted in House
House 1505	No-fault benefits	No action.
Senate 515	A.I.A. plan	Do.
Colorado:		
House 1221	I.N.P. plan	Do.
House 1357	No-fault benefits	Do.
House 1483	do	Passed in House, reported unfavorably in the Senate.
Congress: Senate 945	Hart proposal	Several similar bills pending.
Connecticut:		
Senate 571	Massachusetts plan	No action.
Senate 899	Limited plan	Do.
Senate 702	A.I.A. plan	Do.
Senate 1048	Cotter plan	Do.

¹ Became law.

Legislation	Plan	Action
Delaware:		
House 90	A.I.A. plan	Do.
House 133	No-fault benefits	Do.
Florida:		
House 168	Keeton-O'Connell	Do.
House 65	A.I.A. plan	Do.
House 322	Davis plan	Do.
House 695	Cotter plan	Do.
Hawaii:		
House 181	Davis plan	Do.
House 1417	Limited no-fault	Do.
Senate 1279	A.I.A. plan	Do.
H.C.R. 93	Study bill	Reported in House. Other studies pending.
Illinois:		
Senate 263	Limited no-fault	Do.
Senate 976	No-fault benefits	Do.
Indiana:		
House 1416	Keeton-O'Connell plan	Died.
Senate 640	Cotter plan	Do.
Kansas:		
House 1356	Davis plan	No action.
House Concurrent Resolution 1037	Study proposal	Passed in House, reported in the Senate.
Maryland: House 151	Massachusetts plan	Died.
Massachusetts: House 1530	Repeal of no-fault	No Action. Several other bills pending affecting no-fault provisions.
Michigan:		
Senate 4	Keeton-O'Connell	No Action.
Senate Resolution 45	Study proposal	Do.
House 4734	No fault-benefits	No action. Also House 4847.
Minnesota:		
Senate 568	Davis plan	Killed in Senate.
House 724	do	No action.
House 1737	Cotter plan	Do.
House 2740	Study bill	Do.
Missouri: House 924	Limited no-fault	No action. Also House 953.
Montana:		
House Joint Resolution 29	Study proposal	Now law.
House 451	A.I.A. plan	Died.
Nevada: Senate 301	do	Do.
New Jersey:		
House 829	Study proposal	Now law.
House 2302	No-fault benefits	No action.
New Mexico:		
House Joint Resolution 13	Study Proposal	Now law.
Senate 224	Cotter plan	Died.
House 135	Puerto Rican plan	Do.
New York:		
House 675	No-fault benefits	3d reading in House.
Senate 4400	Limited (Gordon bill)	Reported in Senate.
Senate 4850	New York Insurance Department bill	No action. Also House 6810.
Senate 5792	A.I.A. bill	No action.
North Dakota:		
Senate Concurrent Resolution 4028	Study proposal	Now law.
Senate Concurrent Resolution 4029	do	Do.
Senate 2479	No-fault benefits	Died.
Ohio: House 381	do	No action.
Oklahoma: House 1270	A.I.A. plan	Do.
Oregon:		
House 1851	do	Tabled in House.
House 1300	No-fault benefits	No action. Also House 3001.
Senate Joint Resolution 19	Study proposal	No action.
Pennsylvania:		
House Resolution 34	do	Do.
House 542	Limited no-fault	Do.
House 37	Constitutional amendment	No action. Also Senate 399.
Rhode Island: House 1470	Limited no-fault	No action. Also Senate 667.
Texas: House Concurrent Resolution 110	Study proposal	No action.
Washington:		
House 230	No-fault benefits	Do.
Senate 654	Keeton-O'Connell plan	Do.
House 696	Study proposal	Passed in House. Also Senate 581.
West Virginia:		
House 1209	A.I.A. Plan	Died.
Senate 423	Cotter plan	Do.
Senate Concurrent Resolution 15	Study proposal	Do.
Wisconsin: House 373	Massachusetts plan	No action.

[From the Minneapolis Tribune, Apr. 22, 1971]

BAR SHOULD CORRECT MISTAKES

The Minnesota State Bar Association has published and widely distributed a grossly inaccurate pamphlet attacking Sen. Jack Davies's "no-fault" auto-insurance bill, which is before the Minnesota Legislature. The pamphlet opens with an unsupported statement that Davies's self-insurance plan is "a serious threat to your rights and your family's welfare." This is a curious assertion, because it runs exactly opposite to the conclusions of the Nixon administration after a detailed, two-year study, and because two major insurance companies recently pledged to decrease premium rates by about 25 percent if the Davies plan becomes law.

The first obvious misstatement of fact appears on page 3 of the 12-page Bar Association pamphlet. At present, drivers with good records pay lower premiums than those with bad records. But under the Davies bill, the association asserts in bold-face type, "driving record, good or bad, won't matter at all." The Davies bill contains no provision prohibiting insurers from charging higher premiums for bad-risk drivers. In fact, a number of companies plan to do so, should the bill become law.

The pamphlet goes on to make at least three other serious, flat misstatements of fact and at least two clearly misleading assertions—two on page 4, one each on pages 5 and 6, and so on. The association is aware of these errors. But it has not publicly conceded them, it has not published a correct pamphlet and it has not even circulated a more accurate version among legislators. The original publication remains in the active file of every legislator on committees considering the Davies bill. The pamphlet hardly reflects well on a reputable organization of lawyers and jurists who, by the nature of their profession, ought to be particularly dedicated to factual, dispassionate consideration of issues.

Mr. Moss. Mr. Jones, I want to commend you for presenting a very temperate and very constructive statement to the committee.

Mr. Eckhardt.

Mr. ECKHARDT. Mr. Jones, I cannot tell you how delighted I am to have a man with so much knowledge respecting the State process before us as a witness because this is a matter that we need discussing and have discussed.

Mr. JONES. We both served at the State level at about the same time.

Mr. ECKHARDT. That is correct. It was a pretty good training school.

You state on page 3 of your statement that, first, there is a possibility that the States will not act. Here you are playing the devil's advocate to your own conclusion here and pointing out what arguments do exist against relying on the States. Of course, I think in each case you give some reasons why those arguments may be overturned, but you do point out there that the record of the past 3 years is not impressive; that only Massachusetts has enacted reform legislation and its law is a modest first step.

Do you have any indication that any other State is about to enact such legislation? This is a legislative year. Many State legislatures are in session. Is there any State that you know of that has a bill of this type through either of its bodies?

Mr. JONES. Now you put a high standard there. These things change from day to day, but recently our staff, all of our regional managers, working with our State representatives, made an evaluation, and we put four States at better than a 50-50 chance for enactment this year.

Mr. ECKHARDT. Do you have the names?

Mr. JONES. Yes, sir; I would put Minnesota as the highest. We have a very able, outstanding young man who is the principal advocate—and that is necessary—and that is Senator Jack Davies.

Mr. ECKHARDT. Where is the bill there?

Mr. JONES. It is in committee in both the house and senate. We have had extensive hearings. In the senate, we furnished a lot of information including cost information. Our actuarial committee did a special study. There are discouraging things in every case. Last week the senate commerce committee in effect buried the bill. Now we heard from our legislative counsel on Monday and there were some pretty severe editorials in the paper in Minnesota. They said that they had sufficient votes to bring it to the floor and pass it on a minority report but that they were going to go back to the senate committee to give them another chance to report it as a majority.

Mr. ECKHARDT. With your experience, you would not quite call that a 50-50 chance, would you?

Mr. JONES. We have some pretty good things going.

Mr. ECKHARDT. What other States are involved?

Mr. JONES. Florida is just beginning. Mr. Reid has to leave every once in awhile on the phone to confer with them down in Florida while the committee is taking up the bill.

Mr. ECKHARDT. Has the committee considered the bill?

Mr. JONES. They have not finalized a draft. They started off with a draft submitted by the insurance commissioner, whose main platform during his election campaign was no-fault insurance. The significant thing is that it will have a \$5,000 threshold before there can be a tort liability suit, and this will achieve savings.

Mr. ECKHARDT. When did they start?

Mr. JONES. April 6, and it is usually a 60-day session. By July 1 they will have adjourned, so I believe there is a little better than a 50-50 chance.

Mr. ECKHARDT. What is next?

Mr. JONES. Oregon.

Mr. ECKHARDT. What is the status of that bill? I really want to compliment you for having this at your fingertips.

Mr. JONES. I have all of it. The AIA plan in Oregon got tabled in the house. This is the report as of yesterday. We must be running into difficulty there. We have the support of the commissioner, the majority leader in both houses, and we may be able to revive something.

Mr. ECKHARDT. You have a fourth there?

Mr. JONES. I will have to move it out of that category. We had New York in that category, and it is less than 50-50 now.

Mr. ECKHARDT. Is it in committee now?

Mr. JONES. The Senate committee has reported a bill that we have said should not pass, so there is an unsatisfactory bill on the floor. That bill has minimum savings, and it would be a misrepresentation to the public, and we doubt that Governor Rockefeller would sign it if it passed, and we would ask him not to, so we are in bad shape.

Mr. ECKHARDT. I think we all recognize this committee situation is frequently rather precarious. I remember one committee I served on that you may recall had a deep-freeze subcommittee and a greased subcommittee and what might be called a wading-in-deep-snow subcommittee.

Mr. JONES. We recognize these subcommittees.

Mr. ECKHARDT. You had some others, did you not?

Mr. JONES. Yes. This shows you we are not discouraged but it shows you the problems you are up against. We rated the chances in Connecticut and Colorado about 50-50. I would say in Colorado it was just absolutely wrong. If the Republicans were not supporting a no-fault bill, the Democrats were. We understand we had the help of the Nixon administration and the White House in urging action there, but it went into the deep snow. They are adjourned and we did not get anything, so we lost that one.

Mr. ECKHARDT. It is more appropriate in Connecticut than it is in Texas.

Mr. JONES. In Connecticut, this is the kind of experience you run into. We compromised in order to get a large group of supporters behind one bill. We put in a modified bill. It is better than the Massachusetts plan, but it is still less than we would think would be appropriate in order to get labor support, in order to get other insurance industry support, get agency support and all. Unfortunately, it got killed in one of those subcommittees. But we are making an effort to petition from the Senate floor to bring it out.

Mr. COMEY. It is coming out.

Mr. MOSS. That petition was approved on Monday, was it not?

Mr. COMEY. Yes, it was, and the Joint Judiciary Committee reported it out unfavorably when they learned there were enough signatures for the petition, so it is going to be on the Senate floor for the debates.

Mr. ECKHARDT. Does that complete the States?

Mr. JONES. I guess there are hardluck stories—Hawaii, Alaska, and California. Some people think there is a chance for a bill in California this year. We put it at less than 50/50.

In Hawaii, we snatched defeat right out of the jaws of victory. Both Governor candidates were for it.

Mr. ECKHARDT. By the use of strategy?

Mr. JONES. Yes. We had a common bill and we compromised and found we compromised only ourselves. Our own defense lawyers, whom we thought we had somewhat quieted, came in and put a strategy on us and we are frozen there. To our great distress, we have lost out there.

In Alaska, we have a very fine sponsor, but he has problems on other matters and has been diverted from it. It was reported from the house, but I just do not know whether he is going to have the time to devote to it.

Pennsylvania is a definite possibility. I think the commissioner was here. He plans to submit a bill. The Governor is strongly for it. We have strong companies up there in that area.

Michigan is a possibility. I think one of your earlier witnesses thought they had a possibility to pass a law there. We are fighting very hard to upgrade that law. Michigan has not been as much recognized as Massachusetts in its interests, but it has had a Keeton-O'Connell proposal before it for quite some time, and the legislators are pretty well informed on it, but we are hoping to get together something that will pass there.

Those are the most significant.

Mr. ECKHARDT. I am sure that one of the biggest problems and one of the big dividing problems is the question of at what point no-fault

ends and at what point tort liability begins. For instance, if the definition of what is sometimes called a catastrophic injury is placed too low, I assume you would consider the bill not desirable?

Mr. JONES. That is right.

Mr. ECKHARDT. Of course, if it is placed too high, then you probably have the plaintiff's lawyer on your necks in the various legislatures; is that correct?

Mr. JONES. Yes.

Mr. ECKHARDT. Of course, you do understand there is considerable vying over questions like that, for instance, with lawyers in the legislature, certain groups of insurance people in the legislature on one side, certain insurance groups in the legislature on the other and, of course, the lobby. So, you do have a tremendous potential for diversity amongst the States because of that; do you not?

Mr. JONES. Yes.

Mr. ECKHARDT. As a matter of fact, you mentioned that as one of the other defects of State legislation, did you not?

Mr. JONES. Yes, sir.

Mr. ECKHARDT. If there were too diverse a system, it would be most difficult for the insurance companies to deal with that on a sufficiently uniform basis to realize the advantages of no-fault that might reduce policy costs—

Mr. JONES. That is correct.

Mr. ECKHARDT. There has been some discussion of the dangers of Federal action that possibly somewhat diminished in some of the discussion here. Potentially, intervention in the field could possibly load Federal courts, but I believe we must recognize that the type of suit is a contract suit.

Mr. JONES. You have opportunities.

Mr. ECKHARDT. It could very appropriately and normally be relegated to a State court.

Mr. JONES. And we would recommend that.

Mr. ECKHARDT. I have had some thought that perhaps in any Federal enactment this should be stated specifically considering the *Lincoln Mills* case. I know in the labor mills case whether it says an issue arises under the penumbra of a federally regulated field, the Federal courts have jurisdiction, so I do think we need to address ourselves to that and you would agree this should go to the State court.

Mr. JONES. I think you would have the support of the Chief Justice.

Mr. ECKHARDT. Of course, there might be some matters dealing with the more basic legislation, but there would also be the use of magistrates as the legislation referred to; is that not correct?

Mr. JONES. That is right.

Mr. ECKHARDT. With respect to overloading the courts, it really does not make much difference one way or the other, does it?

Mr. JONES. The overloading of the courts has never been a strong motivating power for action on our part.

Mr. ECKHARDT. I am glad to hear you say that. Of course, we could have retained the 13 original writs if we were overloaded with concern about overloading King's Bench, I suppose.

Mr. JONES. That has not been the reason that we wanted to change the system. We wanted a better insurance product, one that truly reflects the function of insurance companies, which is to spread loss

among those who have the risk on the basis of occurrence. In the tort liability we have got ourselves into, we have started selling expressly on the basis of legal liability.

Mr. ECKHARDT. I agree with you. If we go to a no-fault system, there is no reason why in the world we should not include two-thirds of the payout for all of the property damage.

Mr. JONES. We say run hard.

Mr. ECKHARDT. You don't object to that statement except with respect to the amount; is that right?

Mr. JONES. That is right.

Mr. ECKHARDT. We had a witness the other day who thought the question of the type of car and the dangers inherent in the car might be cranked into the policy.

I have suggested, which I think would be simpler and more directly, that the requirement that the manufacturer sell with the car a 1-year policy. You might make further adjustments depending on the purchaser, but the basic policy would be sold with the car, and at least in that first year the character of the car established by some appropriate agency; possibly the insurance industry would measure the rate.

Mr. JONES. We would not like that at all, and you have raised a big hornet's nest. Motors Insurance Co. is an affiliate member of our association, and it is a subsidiary of General Motors.

Mr. ECKHARDT. I see the delicacy of your position, and I shall pass over it.

Mr. JONES. The first year is usually the best year to cover a car. If we lost all of that business, someone who got lined up with Ford or Chrysler—you know, people are careful the first year.

Mr. ECKHARDT. I would not help you on that, but I would prevent them from insuring themselves so you would get a big lump from Chrysler, Ford, or General Motors.

Mr. JONES. I have one company that would just love to get that.

Let's get back to the damageability and characteristics of an automobile, which ought to be considered in the pricing of the insurance product. I would like to say we are working as hard as we can in that direction, and we have the very able and talented help of Dr. Haddon, who was the first director of the Highway Safety Bureau, and is now president of the Insurance Institute for Highway Safety.

Mr. ECKHARDT. You would have no objection to provision for the expert?

Mr. COMEY. We consider that a major point and where we feel automobile insurance should be primary. If you make other insurance primary, you would probably be eliminating this as a possibility as far as a rating is concerned.

Mr. ECKHARDT. Also, I think you could crank into the rate the cost of repair.

Mr. COMEY. Yes, sir.

Mr. ECKHARDT. Getting out of some aspects and working on the front ends and the taillights. It seems to me this is a consideration that ought to be cranked into the insurance rate.

Mr. COMEY. That is under study at the present time.

Mr. ECKHARDT. Thank you, sir. Do you have any point here with respect to any controversy involving plans or tort liability?

Mr. JONES. Not in our plan.

MR. ECKHARDT. What do you do about pain and suffering?

MR. JONES. We write it out altogether.

MR. ECKHARDT. You don't create some guidelines?

MR. JONES. We started out with it and we abandoned it. Let me tell you what we contemplate, but it does not have to go into the legislation. We tried to pay, in addition to all medical and all loss of income, a percentage of medical loss for additional compensation that was associated with the concepts of pain and suffering in serious cases. We felt this was the most objective criterion with respect to how much pain and suffering there was. We proposed 50 percent but we would go to 100. It does not matter. It goes into the cost of what you choose. We had some doctors, outstanding people in the medical field, who said they really felt this was a bad idea; that they already have enough problems from the liability system, and if they got \$5 for setting another visit to the doctor for a medical——

MR. ECKHARDT. Excuse me, but you have no pain and suffering provisions.

MR. JONES. Bear in mind our proposal is for the necessary insurance. You would have to have it to drive your car to work.

MR. ECKHARDT. I am concerned not about someone who buys insurance to cover any kind of injury. I am concerned about the guy who is hurt and belongs to the ordinary category of driver. With respect to that person, there is no opportunity for recovery from pain and suffering.

The other thing I would like to ask you about is what I shall call partial-permanent disability, and I want to define that because it is somewhat loosely construed. I am talking about the kind of disability where a man may continue on his same job but he performs it with certain strains. Our courts have held in comp cases that a certain amount of disability may be made. Do you have anything comparable to that in your plan?

MR. JONES. I am assuming in your hypothetical that he did not get a lower salary than he got before and performed the same functions.

MR. ECKHARDT. If he were a whole man, he may have held his job and progressed on it. A man who is injured and operating under pain and some degree of disability, may not progress or he may even gradually decline, and it is very difficult for him to prove to you in the case of gradual decline that this has anything to do with the accident. Isn't that true?

MR. JONES. We tried to deal with those cases where we would, as he declined, substitute benefits.

MR. ECKHARDT. How do you do that?

MR. JONES. On a first-party basis.

MR. ECKHARDT. And this is all on a period basis and no lumpsum settlement?

MR. JONES. That is true.

MR. ECKHARDT. Isn't he completely dependent on the insurance company's determination?

MR. JONES. The court should hold that the insurance company was not right in deciding his claim. Then the company would have to pay the claim.

MR. ECKHARDT. But if the——

Mr. JONES. We want him to be compensated for the time spent and compensated as determined by a judge in the court of law. We want a lawyer fairly paid.

Mr. ECKHARDT. What will be the measure of this man who says he has declined in his earning capacity? Is it going to be for that month or will it be some sort of mandatory provision that he continue to be paid a differential of what he can earn or will earn? It is hard for me to see how a court grapples with that.

Mr. JONES. Let's take a clear case of a man who was making \$500 a month and he declined, and the employer said, "You are worth \$380 a month; maybe you can come in a little later and go back home a little earlier." Then we would pay the differential to that man as long as that condition existed or as long as there was disagreement.

Mr. ECKHARDT. What would be the court's decree?

Mr. JONES. It would be a declaratory thing unless we went back and said this was not a valid claim any more.

Mr. MOSS. It seems to me there is very little to go on there.

Mr. JONES. What is little? He says he spent \$85 on seeing doctors, and so on, and it might work, and there might be fair and reasonable fees except from the judge in Dallas, as you will remember.

Mr. ECKHARDT. With respect to your provision here or your suggestion—

Mr. JONES. Are you going to leave the pain and suffering part?

Mr. ECKHARDT. Yes.

Mr. JONES. Mr. Chairman, may I introduce into the record my testimony before the Senate Commerce Committee in December of 1969, and direct your attention to page 11, where we talk about the shortcomings of pain and suffering? And, please, we are not being harsh or difficult when we do this because I would like to point out that what you are doing is giving money to a man where money does not help him. It does not correct anything. We have tried in our plan to replace money wherever that was lost.

Mr. ECKHARDT. I would like to shorten this by moving that this material be placed in the record.

Mr. MOSS. Without objection, the material will be placed in the record immediately following your statement. (See p. 1117.)

Mr. JONES. At the end of that statement there are three charts. From what you can see, our estimate of 50/50 between personal injury and physical damage was the national average.

Mr. ECKHARDT. I agree with you that auto insurance benefits ought to be primary in order to achieve efficiency of administration of the insurance system, but I wonder what you would think about this. Suppose companies were required to offer all other overlapping insurance with some kind of a notice on the insurance that it would overlap this type of insurance and with an offer of a different rate when that type of injury is excluded? What I am getting at—

Mr. JONES. I didn't quite follow you.

Mr. ECKHARDT. Suppose you have some insurance that has to do with hospitalization and medical care.

Mr. JONES. A health policy.

Mr. ECKHARDT. It would be available to you in this sort of situation and suppose, in addition to this, you are required to take the primary insurance with no-fault. It would seem to me then that other parties

which would cover in part the same kind of coverage as no-fault should give some kind of notice to the public that that was the case. That kind of insurance ought to be offered in a form in which you could exclude coverage so as not to overlap.

Mr. JONES. My experts say it is feasible, and I want to say we feel that even if this bill is passed in the form it is, the health insurance companies, the large group writers are going to write out such cases. It is simple from their point of view.

Mr. ECKHARDT. This would encourage them to do it.

Mr. JONES. We would estimate a shift of 10 cents on the automobile premium dollar, depending on whether automobile is primary or secondary. In other words, whatever is advocated, there would be a 10 cent difference if you made automobile secondary instead of primary.

We are concerned about that because it could go another way entirely. You can be sure that is going to prevail and that is the way we think it should be.

Mr. ECKHARDT. Thank you, Mr. Jones. I appreciate your pertinent replies.

Thank you, Mr. Chairman, that is all I have.

Mr. MOSS. How long should we wait for the States to act?

Mr. JONES. One of the things that troubled us about any sort of time limit was that it would almost be longer than we would want to give.

I think as far as our companies are concerned, our association, we feel that we are going to have a very good idea next spring as to whether we think this is feasible—say March 15. I think our people would know by March 15 of next year whether it is a feasible thing or not. Let's put it March 18 since that would be the anniversary date of the DOT report. We know how to activate sensitivity to no-fault legislation on the State level.

Mr. MOSS. Of course, we acted back in 1968 in this committee and on the Senate side because of the failure of the State governments to act. It was a major step for the Congress to even undertake a study in this field. I think it represented to a very large extent the growing concern of the industry that they did not then oppose the action.

Mr. JONES. We suggested to Senator Magnuson that this was very appropriate and we suggested the Department of Transportation as the appropriate agency to do that.

Mr. MOSS. Did you do that because it represented a vote of confidence to State governments that they had done a proper job?

Mr. JONES. We recognized it as a national problem and we want national uniformity.

Mr. MOSS. It had moved away from the kind of problem that lends itself to a rational solution by a very diverse approach based on the actions of 50 individual States.

Mr. JONES. Early we had asked Governor Rockefeller to appoint a study commission, and he did.

Mr. MOSS. He could never get funding for it.

Mr. JONES. No; he never got his \$350,000 and he had to have the insurance department do it. I think some of the opponents feel now they would rather have had a commission rather than the insurance department.

Mr. Moss. The New York Legislature is being subjected to great pressure now to do nothing and that is very typical of the manner in which attention is focused upon a legislature that starts moving in this field, is it not?

Mr. JONES. Yes, sir; that is true.

Mr. Moss. Learning from my colleague here, and apparently your former colleague, that you have had State legislative experience, does that experience leave you with the strong conviction that there will be really any significant progress in the next 5 years?

Mr. JONES. I was an assistant attorney general in Texas and I was in charge of drafting legislation—

Mr. Moss. You were in close enough touch with the legislative committee to see how it was handled.

Mr. ECKHARDT. The man in that position was usually more familiar with State legislation than the members.

Mr. JONES. I drafted 945 bills in one session.

Mr. Moss. That was a good exercise.

Mr. JONES. We are honored in New York State to have a citizens' committee against no-fault.

Mr. Moss. It certainly is a masterpiece of misstatement, but it is typical. I think this is the one you are talking about. It is a masterpiece of the kinds of campaigns directed against State legislatures.

I served 23 years ago as a member of a legislative committee on public utilities and corporations. We had matter of this type. Progress was slow then and on some of the issues I have devoted attention, and I have seen that they are still around in the legislatures.

Mr. JONES. Mr. Chairman, I did not mean to try to escape answering your question about whether I could see action in the next 5 years. We do, for this reason, and I would like to talk about our experience in Massachusetts, if I could.

We wanted a much broader law in Massachusetts but when Representative Dukakis advised this was the most we were going to get, we stabilized. The real outstanding legislators across the country were observers and they went for it, but we wanted property damage to be in there. Now the Government wants property damage, so now we should get some action.

Mr. Moss. We will have the Governor here tomorrow.

Mr. JONES. In 1 year, it is going to grow in Massachusetts, and we are getting all of the savings we forecast and maybe some more in the lines of insurance.

We have had a bad winter—we have had 15.5 percent more accidents. They are weather-affiliated accidents. All loss ratios are higher than they should be, but that is the principal reason. We expect that to adjust as we move into other periods.

When we achieved this, I indicated that if we could get six more States this year and show economic benefit to these people--and there are substantial savings in your bill, in our bill--then we thought the States could take it up more rapidly than they might with some other kind of legislation.

I hope you will understand with us that our companies prefer making transitions. They are more for transition on a State-by-State basis. We had to get new forms for Massachusetts. We are extremely proud of the forms we got up there. These are the best of the forms

we worked up. We have not found any major changes that we have had to make yet. We told the Massachusetts Legislature it would take us 9 months to do it. We get only four, but we made the transition in January. We do not have a Ph. D. in every position, and it is frightening to contemplate changing all of the personnel, their forms and their features all across the country at one time. The companies are training people in Massachusetts who will be useful in other States.

Mr. Moss. There is still that computer there that you are going to have to communicate with and get answers from.

Mr. JONES. If we do not get uniformity, we will probably have to first come to you and cry on your shoulders a little bit.

Mr. Moss. The administration report calls for 25 months.

Mr. JONES. We would be glad to give you a comprehensive report on March 17, 1972. That is 1 year after Volpe gave us the report to work with. I would still be hopeful of a situation that would indicate that maybe only two or three would be involved if you get all the breaks.

Sir, I don't want to put this document in the record because it is too much but—

Mr. Moss. We can receive it for the committee's records.

Mr. JONES. When the DOT report came out on March 18, we prepared condensations, a condensed statement of each one of the 23 parts of the Volpe report, the concurrent resolution and a synopsis of his recommendations. We mailed more than a thousand of these out first to the newspapers. We put it in the editorial departments of the major newspapers, and we sent it to State legislative counsels or interested legislators, Governors, insurance commissioners, and so on. We are hopeful, and we consider the DOT report a continental divide, a change in the watershed. We are hoping it will have impact.

Mr. Moss. Mr. Guthrie.

Mr. GUTHRIE. Mr. Jones, you are still urging this State-by-State approach in light of the fact that there is still considerable dissatisfaction on the part of the policyholders with the rates that are presently being charged them, and in view of the fact that the Secretary of Transportation, Mr. Volpe, said a State-by-State approach—I think I had better qualify that—would be more costly than another type of approach.

Mr. JONES. We would agree with that if we get a variety of different programs.

Mr. GUTHRIE. Even if you do not, will not the argument still be made State-by-State if we adopt no-fault in this State we are going to have to buy it within the State and liability insurance not to go outside the State?

Mr. JONES. We have worked that into our program and our pricing includes it.

Mr. GUTHRIE. But would it have to be included if it were adopted on a national basis?

Mr. JONES. No.

Mr. GUTHRIE. How much extra cost is reflected for policyholders?

Mr. JONES. There is a tradeoff. The claim that might be made under what we call residual legal liability, under the national system, would be paid under the primary first part of the benefits system, but I will have to go to my expert on my left here.

Mr. COMEY. I don't know what you are driving at. We have a residual liability system, and it would be similar to the catastrophic—

Mr. JONES. He is saying if we did not have to figure in the residual liability because one system was being enacted nationwide at one time, how much money would we save?

Mr. COMEY. Very little. Out-of-State accidents account for a small proportion of the number of drivers.

Mr. JONES. Our plan estimated that 6.7 cents of the dollar was for this residual liability for out-of-State auto accidents.

Mr. ECKHARDT. Would the gentleman yield?

Mr. MOSS. Yes, indeed.

Mr. ECKHARDT. Are you quite sure accidents involving cars from New York, for instance, do not frequently occur in New Jersey?

Mr. COMEY. In Washington, D.C., I would expect a higher frequency of accidents with out-of-State cars, but I am talking in the normal State.

Mr. ECKHARDT. Of course, the normal State or the heavily populated States are frequently small.

Mr. COMEY. It varies by State and our cost savings vary based on these conditions.

Mr. ECKHARDT. Could you give us some figures on that? I doubt that this is such a small figure.

Mr. COMEY. Our study was done on a seven-State average basis.

Mr. ECKHARDT. What seven States?

Mr. COMEY. Massachusetts, New York, Illinois, Wisconsin, California, Rhode Island, and Connecticut.

Mr. ECKHARDT. I was afraid they would not all be representative.

Mr. JONES. They are above average. We had Massachusetts, New York, California, and Illinois, and those are the tough ones.

Mr. ECKHARDT. California would be a State more separate from other heavily populated areas.

Mr. COMEY. We made an adjustment in our cost study because of that very thing, and we based our out-of-State accidents on the analysis of claims in Massachusetts, Rhode Island, and Connecticut, I believe, on the basis that these were small, congested type States where we would get a better representative figure for out-of-State accidents.

Mr. ECKHARDT. I wonder if we should have some raw data on this. I think this is very serious.

Mr. JONES. Our original study has several tables at the back. The New York Insurance Department includes this study.

May I also refer the committee to the highway statistics of the Bureau of Public Roads. I would think you would be interested in figuring out-of-State traffic nationwide. With respect to the people, say, on long trips, you have to remove the New York situation, but we average it in overall. On long trips, they are usually more careful on those long stretches than when they are driving around home. Eighty-five percent of your trips have the home as the origin of beginning and destination. Most accidents have occurred on these 85 percent of trips where they are going to work during the day or to the shopping center, going to pick up the kids, and so on—they are late, hurried, or what have you. These are where you would have your problems.

Mr. GUTHRIE. 6.7 cents is not an inconsiderable amount.

Mr. JONES. It is considerable.

Mr. GUTHRIE. But not when you are confronted with people who feel they are paying too much already.

Mr. JONES. Comparing it with the total duplication of other health insurance policies and other types of coverage and all, it is 10 cents.

Mr. COMEY. Even if you had no-fault in every State, not all of that 6.7 would disappear.

Mr. GUTHRIE. You have companies writing business in Massachusetts. I am certain you have read the Governor's evaluation of the system.

Since the Governor is going to be here tomorrow, would you care to tell us some of your attitudes toward the Massachusetts experiment?

Mr. JONES. Yes; I would like to very much.

First, I mentioned Representative Dukakis and I want to give him a great deal of credit for his effort and great work. He did not exactly support us but he found the experience very grueling. We supported a complete no-fault plan for quite a while before the Governor did, and we stuck with it until Mr. Dukakis indicated it would be wise for us not to any longer. We were very pleased when the Governor became interested in it. We are not an insignificant group in Massachusetts. Our member groups write 60 percent of the business in Massachusetts. We have made every effort to put the plan into operation and make it work effectively. We have instructed our agencies.

Governor Sargent did not think the companies have made available to policyholders the deductibles. Some of those deductibles, from liability policies, we opposed because once a buyer buys this type of liability, he does not know he pays the first \$100 and the insurance company pays the rest. We thought he would forget and it would be unsound policy.

Nevertheless, we told our agents to sell it to anyone who wanted it. We had training sessions with the agents. They did an outstanding job, and they had espoused the bill for 4 years.

I would like to put in the record three of the publications by our member companies. One is the publication of the Massachusetts Association of Independent Agents and Brokers explaining the plan to the public and giving a place for the agency to put its name.

This is a particularly fine job. It was prepared by Mr. Dale Comey's company to explain to the people the highlights of the new auto insurance law. Then, one by Employers Commercial Union, which is one of the major companies, with headquarters in Massachusetts.

Mr. Moss. Without objection, the matters will be included in the report at this point.

(The material referred to follows:)



Space for
Agency Name

WHY NO-FAULT AUTO INSURANCE?

Because study after study has shown that an auto insurance system that is fully dependent upon tort law leaves many gaps in protection, is inequitable, inordinately expensive, marred by delays, and grossly inefficient.

The most recent studies are those performed by the U.S. Department of Transportation and the New York State Insurance Department. Preceding these, was the Keeton-O'Connell study released in 1967. These studies show as examples of the problems connected with a tort system that:

(1) Some 25% to 35% of the people actually suffering bodily injury receive absolutely nothing from liability insurance.

(2) The seriously injured aren't paid enough to pay even their actual out-of-pocket losses. For example the Department of Transportation study shows that where actual economic loss is \$10,000 or more that the average recovery of that loss is only 20% under auto insurance.

(3) Those with relatively small hospital and medical expenses get anywhere from three to ten times their actual out-of-pocket losses. This is true because of the thousands of slightly injured people who are overpaid with nuisance settlements to avoid the even higher costs of court action.

(4) Payments are delayed ten times longer than the payments from first party insurance such as collision and forty times longer than payments under accident and health policies.

(5) As much as 56 cents out of every premium dollar goes to operating the system with only 44 cents going to the victims.

To date the system has chosen only to help those who can show that someone else was responsible. In the abstract this makes some sense. In practice, however, it is simply beyond justification.

The new Personal Injury Protection no-fault law changes this, for it says — let's take care of victims first, regardless of who was at fault, and let's do it efficiently and quickly.

Some Questions and Answers to Explain the New

NO-FAULT AUTO PLAN

Q. What does the new no-fault insurance plan cover?

A. Briefly, it will pay up to a total of \$2,000 to every person injured while occupying an insured car, or a pedestrian struck by such a car, for his medical, hospital, and funeral expenses and 75% of his wage or salary loss. Regardless of who was at fault these benefits will be paid promptly by the company insuring such a car. This new limited coverage has been added to compulsory insurance and you will still need to carry high limits of protection against law suits.

Q. If everyone is entitled to up to \$2,000 without regard to fault, how can the new plan reduce costs?

A. It does this by eliminating the "nuisance value" of small claims because people with minor injuries will be paid only for their actual out-of-pocket loss.

Q. Doesn't that mean that benefits are being reduced?

A. Only to the extent that benefits under the no-fault plan will be limited to actual out-of-pocket losses unless the amount or nature of the injuries permit bringing an action for pain and suffering. But, the excessive dollars which have

been paid to people with minor injuries under the old system are the reason why the Massachusetts auto insurance rates are among the highest in the country.

Q. When may I bring action for "pain and suffering" benefits?

A. You may bring action against the person at fault in an accident for pain and suffering damages if your hospital and medical expenses are in excess of \$500 or if the injury causes death, loss of limb or other body member, permanent and serious disfigurement, loss of sight or hearing, or a fracture.

Q. Does the new system reward the reckless driver?

A. No. The law authorizes companies to deny no-fault benefits to those persons whose injuries result from their own drunken driving, driving under the influence of drugs, seeking to avoid arrest, committing a felony, or driving with intent to injure themselves or others.

Q. If my company pays me when someone else is clearly at fault, won't my company consider me a bad risk?

A. No. This plan permits insurance companies to arbitrate the question of fault outside of the courts and among themselves. Your company will be reimbursed if you are not at fault and your record will be clean.

Q. May I collect no-fault benefits if I have Blue Cross or other private medical hospital insurance?

A. Absolutely — you can collect from both for medical and hospital costs. If you do not want to receive double payments you may wish to consider a deductible.

Q. What about those deductibles, are they a good buy?

A. In most cases we do not believe that the dol-

lars you would save are worth the benefits you will lose. We would be happy to discuss your own individual circumstances with you if you would like.

Q. May I collect no-fault benefits if I have a wage continuation plan?

A. The new plan assures that you will receive 75% of your average weekly wages by adding to your wage continuation plan an amount that together will equal 75%. Special safeguards are provided to be certain that if your wage continuation plan is reduced or exhausted because of an auto loss, the wage loss resulting from a future loss or illness will be covered under the new plan.

Q. Is a person that is eligible for Workmen's Compensation benefits in a different position under no-fault than he has been in the past?

A. No. The injured employee may still collect Workmen's Compensation benefits or he may bring action against the party at fault.

Q. How are pedestrians protected?

A. A pedestrian will be paid by the no-fault benefits of the car that hits him.

Q. What about accidents that involve out-of-state motorists or occur out of state?

A. You may collect the no-fault benefits whether the accident is in Massachusetts or elsewhere. You are protected against any law suits if the accident is in Massachusetts by your compulsory insurance and out-of-state by your extra-territorial coverage.

Q. Are Property Damage and Collision losses included in the no-fault plan?

A. No. The plan applies to Bodily Injury only. That's why insurance companies opposed the arbitrary rate reductions on these other coverages that were not affected by the new plan. Property Damage and Collision losses will continue to be handled in the same man-

ner as in the past until the legislature extends the no-fault principle.

Q. Is Merit Rating included in the new plan?

A. Yes. The law directs the Commissioner of Insurance to establish a merit rating plan to take effect January 1, 1972 based on your individual driving records starting September 1, 1970. The surcharges and credits included in the law are to be used only if the Commissioner does not provide a plan of his own. Best estimates are that a new plan will be provided.

Q. Does the insurance industry really want to provide the public with a merit rating plan similar to other states?

A. Yes. The industry believes that the best means of rewarding safe drivers is to permit companies to use their own plans as they do in other states *through competitive rating*. Legislated plans, just as legislated rates, do not permit them to compete for the safe driver.

Q. You said competitive rating; doesn't that mean that the insurance companies will get together and increase my rates?

A. No. Competitive rating simply means that companies will be permitted to compete for your business and that your agent or broker will be able to shop for the best price and coverage to meet your individual needs. Rate making should not be part of the political process; that is what has caused most of the problems to date.

Q. O.K., the plan sounds pretty good. Is it perfect?

A. No system is perfect. We believe that the no-fault approach of paying benefits to more people, more quickly, without regard to fault and at lower premiums is much better than the inequities of the old system. We are proud of working hard to provide this improvement for you. It's worth your fighting to protect.

PIP

**Massachusetts
Personal
Injury
Protection
Plan**

PIP

**Some questions in
explanation of the new
no-fault automobile
insurance plan**

The country's first no-fault auto insurance program — called "the Personal Injury Protection Plan" (PIP) — is now in effect. The purpose of this question and answer pamphlet is to give our policyholders a better understanding of this new law and how it will work.

Q. Where are the provisions in my policy for the new No-Fault coverage?

- A.** There are two Divisions of coverage under Coverage A of your new policy. Division 1 covers the compulsory liability coverage that was required under your old policies. Division 2 of Coverage A provides the new compulsory Personal Injury Protection required under the new No-Fault law.
-

Q. Who is covered under PIP (Personal Injury Protection — Division 2)?

- A.** The named insured and members of his household, authorized operators and other occupants of the insured vehicle, and any pedestrian struck by the insured motor vehicle.

The named insured and any member of his household who is injured while riding in a motor vehicle not insured for PIP.

Named insured and any member of his household who is struck as a pedestrian by a vehicle not covered by PIP coverage, may recover under the named insured's PIP coverage — unless such injured person recovers from a third party.

Q. Who is not covered under PIP?

- A.** Any injured person entitled to Workmen's Compensation laws of any state.

Any person who is injured while operating a vehicle, (a) under the influence of alcohol or narcotics, (b) while committing a felony or trying to escape arrest by police, (c) or while intentionally causing injury or damage to himself or others.

Any pedestrian who is not a resident of Massa-

chusetts and is injured in an accident outside of Massachusetts.

Q. What are the territorial limits applicable to PIP?

- A.** Personal Injury Protection under Division 2 applies to motor vehicle accidents within the United States of America, its territories or possessions, or Canada.

Q. What are PIP benefits?

- A.** PIP benefits provide direct payment up to \$2,000 per person per accident for:
1. All reasonable and necessary medical expenses incurred within two years from date of accident. PIP benefits for hospital and medical expenses are payable whether or not other health insurance applies.
 2. If employed or self-employed:
 - a. 75% of average weekly wage (based on a one year period preceding date of accident) less any salary continuation program benefits;
 - b. Any payment made to non-household members for necessary services that would otherwise have been performed by the injured person or members of his household (i.e. snow shoveling or grass mowing charges).

Q. Is there any limit under your policy to the number of PIP claims that can arise from any one accident?

- A.** There is no limit to the number of PIP claims arising from one accident. For example, if the insured has six passengers injured in his car, PIP will extend up to \$2,000 PIP coverage *per person* up to a maximum of \$12,000.

Q. How will PIP benefits be payable with respect to medical and hospital expense?

- A.** Assume a passenger in the insured vehicle incurs \$300 in reasonable medical expense. He would be entitled to direct reimbursement of \$300 for this expense even though he might also have insurance for such expense in another medical plan.

Q. How will PIP coverage apply to wage loss?

- A. If a covered person is disabled from work for a period of one week he would be entitled to recover a payment equal to 75% of his average weekly wage or salary or their equivalent for the year immediately preceding the accident, if he is not entitled to any benefit under a wage continuation program with his employer.

If the injured person is entitled to benefits under a wage continuation program with his employer, then the PIP benefit will be reduced to the extent of the benefit received under the wage continuation program.

For example, if the injured person had an average wage of \$100 per week and received a \$50 wage continuation benefit, he would only be entitled to an additional PIP benefit of \$25, which would bring him to 75% of his average weekly wage.

If his wage continuation benefit paid him \$80, then he would not be entitled to recover PIP benefits.

Q. Are PIP benefits subject to a deductible?

- A. The benefits payable to each person for a single accident may be reduced by a deductible in the amount of \$250, \$500, \$1,000 or \$2,000. The deductible applies, at the named insured's option, either to the named insured alone or the named insured and members of his household. The deductibles have no application to any other person who is injured as an occupant in the insured vehicle or as a pedestrian struck by that vehicle.

Q. Am I entitled to recover from the person who injured me for loss for medical expense or wages not paid under PIP?

- A. Yes. You can recover the difference that is not covered under PIP, but you must prove that the other party was at fault.

Q. Does the new law impose any restriction on my right to recover for pain and suffering from the person who injured me?

- A. Under the new No-Fault law, no person injured in a motor vehicle accident in Massachusetts can recover damage for pain and suffering unless his reasonable and necessary medical expenses exceed \$500 or unless the injury results in death, loss of all or part of a bodily member, permanent

and serious disfigurement, loss of sight or hearing, or a fracture.

Q. Is the owner or operator of a motor vehicle insured under PIP exempt from legal liability to the injured person?

A. Every owner and operator of a motor vehicle who carries the new compulsory PIP coverage is exempt from legal liability for damages to the extent that the injured party recovers PIP benefits or would be entitled to recover PIP benefits, except for the deductible.

For example, assume that A and B are both operating vehicles carrying PIP coverage and that B negligently collides with A, causing personal injuries to A.

Assume that A recovers \$1,500 in PIP benefits from his own insurer for medical expense and loss of wages.

If A institutes a legal action against B for negligently injuring him, A can not recover any damages from B for medical expense or wage loss to the extent of \$1,500.

Q. Does the new No-Fault statute have anything to do with property damage?

A. No. The new plan applies to bodily injury only.

Q. What must an injured person do if he has an accident?

A. First, do just what you have always done. Exchange information with the other party: name, address, license and registration numbers, witnesses and names of insurance companies as stamped on registration certificates. If there is a personal injury or property damage in excess of \$200, you must report it to the Registry of Motor Vehicles.

Then you must present your PIP claim to the insurer as soon as practicable after the accident. You must authorize the insurer to obtain information about your wages and your physical condition so as to assist in determining the amounts that are due.

Q. What happens if the injured person first institutes a legal action for his injuries before he makes a PIP claim?

A. The automobile insurer is entitled to withhold

making any PIP benefit payment to the injured person until the court action is disposed of.

Q. What is the Assigned Claims Plan?

- A. It is a plan for the protection of Massachusetts residents who do not own automobiles or who do not have PIP benefits available to them.

Q. What effect does the PIP plan have on Medical Payments coverage under the policy?

- A. Medical Payments coverage is for payment of medical expenses incurred after PIP benefits have been exhausted.

Q. How will Uninsured Motorist coverage be affected by the PIP plan?

- A. The insured and any member of his household injured by an uninsured motorist must first claim PIP benefits. Once these PIP benefits are exhausted, he may then recover any damages that are allowed by law under the Uninsured Motorist coverage.

The above questions and answers are intended to serve as a guide for our policyholders and are not intended to be a complete and precise definition of their rights under the No-Fault plan.

We emphasize prompt reporting of accidents and claims to our Claims Department, which will enable us to assist in processing claims promptly.

If, after reading this pamphlet, you have any unanswered questions, please contact your Employers-Commercial Union Companies' Agent.



Employers-Commercial Union Companies

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**Highlights
of the
new**

**Massachusetts
Auto
Insurance
Law**

**What
it means
to you . . .**

Just what is the new law?

The new Massachusetts law—often referred to as the “no-fault” law—is the first of its kind in the country.

It provides that “Personal Injury Protection” (PIP) benefits are payable for medical and hospital expenses and loss of wages incurred by the injured victims of automobile accidents regardless of who is at fault.

The important thing to remember is that if you are hurt you do *not* have to sue and prove that someone else was negligent in order to collect the new “no-fault” PIP benefits. In most cases you will make your claim against your own insurance company under your own policy.

What types of losses does PIP pay for?

PIP provides reimbursement for medical expenses, loss of wages and certain expenses for hiring others to do work you would have done if you had not been hurt.

Medical expenses include all reasonable expenses incurred within two years of the accident for necessary medical, surgical, X-ray and dental services, prosthetic devices, ambulance, hospital, professional nursing and funeral services.

Wage loss benefits are limited to 75% of the actual wage losses. If you have a wage continuation plan, PIP will pay an amount sufficient to raise the total payments you receive to the 75% level. If you are not employed, you may be entitled to benefits for a reduction in earning power.

The total payments for medical expenses, wage losses and other expenses combined are limited to \$2,000 per person.

Are PIP benefits subject to a deductible?

Optional deductibles under the PIP coverage afforded by your own insurance company are available for yourself alone or for yourself and members of your household in amounts of \$250, \$500, \$1,000 and even the full \$2,000. These deductibles result in rate reductions—but, of course, they also reduce or eliminate your personal insurance protection for accidents covered by your policy.

The deductible applies both to the loss and to the maximum amount of PIP benefits available. For example, if you elect a \$250 deductible, you will get no PIP benefits for the first \$250 of loss and the maximum amount of benefits payable is reduced to \$1,750. If you elect the \$2,000 deductible, this is equivalent to deciding that you do not want to receive any PIP benefits from your own company.

Before electing a deductible, therefore, you should make certain that you have adequate health insurance and wage continuation programs, bearing in mind that most health insurance policies also include a deductible. Your insurance agent will assist you in making your decision.

Which insurance company pays PIP benefits to me and members of my household?

Your company pays PIP benefits (subject to any deductible you may elect) for injuries sustained by you or members of your household

1. while occupying your *motor vehicle* or a *motor vehicle not insured for PIP* benefits under the *Massachusetts no-fault law* (mainly out-of-state registered motor vehicles).
2. while a pedestrian through being struck by your *motor vehicle* (an unlikely but possible accident) or a *motor vehicle not insured for PIP*.

If you or a member of your household is injured while occupying, or while a pedestrian through being struck by, a motor vehicle (other than your motor vehicle) which is insured for PIP benefits under the Massachusetts no-fault law, the company insuring the other motor vehicle pays the PIP benefits (without any deductible).

**Who else is covered for PIP
under my policy?**

In addition to covering you and members of your household as outlined in the answer to the preceding question, your PIP coverage also applies (without any deductible) to injuries sustained by any other authorized operator or passenger while occupying your car or any other pedestrian through being struck by your car.

Who is not covered for PIP benefits?

Those not covered for PIP benefits are:

1. Persons entitled to Workmen's Compensation benefits.
2. Persons while driving under the influence of alcohol or narcotics, while committing a felony or avoiding arrest or while driving with intent to cause harm.

**What if expenses and losses
exceed \$2,000?**

You are entitled to make a claim against any other party at fault for any losses in excess of the \$2,000 maximum PIP benefit. In this situation, you have to prove that the other party is legally liable—just as you did under the old law.

However, you do not have to wait for your PIP benefits. You receive them immediately and regardless of the outcome of the damage suit.

Are out-of-state accidents covered?

PIP benefits apply to injuries occurring outside Massachusetts, but within the other states of the United States of America, its territories or possessions or Canada, on the same basis as within Massachusetts, except that injuries to pedestrians are not covered unless the pedestrians are legal residents of Massachusetts.

Since no other state presently has a "no-fault" law, you can sue the owner or person responsible for the operation of another motor vehicle for damages based on fault. PIP benefits do not become payable until a settlement or final judgment is made. Duplicate recovery is not permitted.

Doesn't PIP coverage cost more?

No. In fact, the rates for your compulsory bodily injury liability coverage (including the new PIP provisions) actually have been reduced 15% for 1971.

Does the new law exempt me from liability if I am at fault?

Only partially. With respect to injuries sustained by others in Massachusetts, you are exempt from liability for that portion of loss covered by PIP benefits, or which would have been covered but for the application of a PIP deductible.

You are also exempt from liability for pain and suffering associated with such injuries, except when:

1. Medical expenses exceed \$500; or
2. The injury sustained causes death, dismemberment, permanent and serious disfigurement, or a fracture; or
3. The injury results in loss of sight or hearing as described in the Massachusetts Workmen's Compensation Act.

You are not exempt from bodily injury liability for expenses or loss in excess of the \$2,000 PIP benefit, for out-of-state accidents, or from property damage liability claims. Accordingly, we advise you to carry bodily injury and property damage liability coverage with adequate limits to protect you.

Other motorists covered for PIP under their policies have the same exemptions from liability if they are at fault.

What about the new property damage liability deductibles?

While your property damage liability insurance remains optional under the new law, you can now get a lower rate by choosing either a \$100 or \$200 deductible.

We do not recommend deductibles for liability insurance. However, you must

decide for yourself whether it is worth getting yourself involved in handling property damage liability claims against you and risking \$100 or \$200 of your own money to obtain a small premium saving.

It is important to remember that Massachusetts has the highest property damage claim frequency record in the country. In a recent year, there were 13 property damage claims per 100 cars insured. Well over half of these claims were for \$200 or less.

What about my other insurance coverages?

In addition to PIP you must still carry compulsory bodily injury liability coverage of \$5,000 per person and \$10,000 per accident.

The other bodily injury coverages in your auto policy remain basically unchanged. However, the following modifications have been made necessary because of PIP:

Medical Payments Coverage—any payment made under this coverage will exclude whatever was payable, or would have been payable but for the application of a deductible, under PIP. Also, the time limit has been extended to 2 years, the same as for PIP benefits.

Uninsured Motorists Coverage—this is still compulsory, but has been revised to exclude any benefits which are payable, or would have been payable but for the application of a deductible, under PIP.

What do I do if I have an accident?

There is no change in this procedure. First, exchange information with the other party: name, address, license and registration numbers, witnesses and names of insurance companies as stamped on registration certificates. If there is personal injury or property damage in excess of \$200, you must report to the Registry of Motor Vehicles.

Then—and this is most important—immediately notify your own insurance agent or company. In this way, you speed the recovery process and collect directly and promptly for your injuries.

How does the Hartford view the “no-fault” concept?

We support the “no-fault” approach to compensating the victims of automobile accidents. We feel it will enable us to pay benefits to more injured persons more promptly and at lower cost than the present fault system which prevails in every state except Massachusetts.

The new Massachusetts law establishes a limited no-fault system. We hope it can be expanded and improved as experience develops. For example, we would like to see the amount of no-fault benefits increased. We think greater savings would be achieved if property damage were included and the expensive subrogation procedures eliminated.

Nevertheless the new Massachusetts law is an encouraging step towards real automobile insurance reform and we will strive to make it work efficiently.

We will continue to stress in every way possible the need for safer automobiles, safer highway designs and stronger legislation to protect motorists from reckless drivers.

You can help yourself and the insurance system immeasurably by observing the simple rules of the road: Drive Carefully, Courteously and with Common Sense.

Mr. JONES. I have talked to the managers up there, and companies up there have had an increase in personal injury claims. We have not even by this time had reports on all of the accidents that have occurred during March. They have a period of time to which they are entitled to wait before they tell us. We are concerned, because we are told through legal circles that many of the lawyers are holding back cases pending the supreme judicial court hearing on May 6. We have retained, along with the American Mutual Insurance Alliance, Mr. Archibald Cox, who has filed a brief on the constitutional question, and he has completed that brief.

We will be happy to send the committee a copy of the brief.

We know that our estimates as to percent of savings on certain items have been confirmed. As I say, we have had an offsetting experience because of a bad ice condition up there in Massachusetts, so the overall, the bottom line loss ratio is extremely high. Massachusetts has done things differently in several respects. Basically, we write policies for the whole year. In other words, everybody's policy is written on January first so normally there would not be a rate change for anybody until the next January. On these personal injury things, the maximum rate is set by the commissioners and in recent years it has been very closely set. We hope by September that we will have enough figures—and these would not be what we would consider adequate figures—to give the Department a pretty good estimate of what has happened, but that is an awfully short time for experience.

Mr. COMEY has to do the work like this for companies, and I would like for him to speak to this.

Mr. GUTHRIE. Would your experience support Mr. Dukakis' estimate that the people of Massachusetts were saved about \$100 million of premiums in 1970 as a result of the enactment?

Mr. COMEY. I do not have those figures.

Mr. JONES. I think we concurred in those figures at the time he made them.

Mr. REID. In the sense that the rates charged actually during 1971 were lower than they would have been had this law not been enacted, it is a matter of calculating these savings.

Mr. JONES. I forget who developed these figures, but I think we concurred in these figures.

Mr. GUTHRIE. I would like to ask one further question.

Mr. ECKHARDT. There is one question I would like to ask at this point if the gentleman would yield.

Mr. GUTHRIE. I yield.

Mr. ECKHARDT. There was a lot of premium payment but also payout, wasn't there?

Mr. JONES. I do not think you can draw a very valid conclusion. I had one company that had an increase in physical damage claims.

Mr. ECKHARDT. Could we get a record of premium payments to payout?

Mr. COMEY. Are you referring to the actual experience in Massachusetts to date?

Mr. ECKHARDT. I guess we should get that from the Massachusetts witnesses, but a reduction in premium payment does not necessarily reflect a more effective system.

Mr. COMEY. The figures you brought up earlier about 40 percent going to injured people under liability system——

Mr. ECKHARDT. If premium payments are reduced but at the same time benefits under insurance plans result in less payout, it seems to me we do not have anything better for the people.

Mr. COMEY. Some of it was due to loss adjustment expense. To this extent, part of the savings was due to the loss adjustment expense. A larger proportion of the premium dollar will go to pay claimants, insured persons' losses, than under a tort liability system.

Mr. ECKHARDT. Perhaps not, but I think none of these figures standing alone without considering a good number of other figures is really very meaningful.

Mr. JONES. I think we would agree.

Mr. COMEY. We definitely do not feel there is any experience to date that is credible enough or believable enough to be able to make valid assumptions as to how the plan is doing with respect to premium savings.

I served on the committee which estimated the 15-percent deduction. The premium deduction would have been significantly higher if bodily liability rates had been adequate at that time. There are a lot of problems in setting rates, but I do not believe there is any experience to date to say that that 15-percent figure should be something else.

Mr. ECKHARDT. The significant thing to me would be what percentage of the total premium payment reflected in net payments going to claimants.

Mr. GUTHRIE. The last question, Mr. Chairman: Mr. Markus, the president of the American Trial Lawyers Association, in his testimony before the committee the day before yesterday, I believe, and unfortunately the transcript has not been available to permit you to study his statement, but have you had an opportunity nonetheless to study his presentation before the subcommittee?

Mr. JONES. No, I have not. I was informed of the presentation but I cannot say I have had a chance to study his presentation.

Mr. GUTHRIE. Mr. Chairman, would it be appropriate for him to have an opportunity to comment?

Mr. MOSS. Yes.

Mr. JONES. I understood that Mr. Markus described things in terms of money going to the innocent and to those who are guilty. We administer this system and we say there is no socially redeeming value in what we are administering. We are paying people who are just as guilty as they can be, and we are not paying some people who are just as innocent as they can be. When a man walks in with \$50 in medical expense and says he will settle for \$150, we will do that, but we did not have to pay \$825 to a defense lawyer to defend a claim. What this shows is that things do not work in the way Mr. Markus outlined them in his theoretical charts. We did a study and we made it as large as the actuaries told us they wanted it. We took 16,000 personal injury claims. We were assured we had a representative sample. You will be interested, Mr. Eckhardt, that out of these 16,000 personal injury claims, 14 out of 16,000 would fit your category of permanent total disability.

Mr. ECKHARDT. Eliminate the 14 and permit tort liability without creating a very high override of liability insurance, could we not?

Mr. JONES. That is right, and we are not completely satisfied with your definition, but we know we will get some from somewhere.

I am afraid my earlier point escaped me.

You will also be interested in the impact of the lawyer. We divided up the claimants here to show you what those who were represented by a lawyer got and what those who were not represented by a lawyer got, and we paid them both very well.

Mr. Moss. Just pressing the same point I did earlier, your statement in effect says that we need a change now?

Mr. JONES. Yes, sir.

Mr. Moss. The Secretary of the Department of Transportation was very emphatic in saying we did not need a change now. The general tenor of several witnesses was strong opposition to no-fault primarily because of those who have not said we need it now. Do you think we are going to get it now by the State legislatures?

Mr. JONES. We are not yet discouraged.

Mr. Moss. You are a man of high optimism and I compliment you on it. I hope we do not have to wait until next March to have action here in the Congress on this legislation, because I am very afraid, and let me say I feel almost assured, the legislators will not make any dent in any significant numbers by next year.

Mr. JONES. Looking at it from our companies' point of view, we wanted a chance, and I hope you do not take offense at this because the staff and I were responsible for that. Frankly, we did not estimate to our members that this Congress would show this much motivation in time. Our companies want to see the changes come in bite-size pieces. That is something the Congress will not necessarily be interested in, but I can imagine you can understand why the companies would be interested.

Mr. Moss. In your statement, there is a recognition for a need for a high degree of uniformity, with all due respect to the laws of the various States.

Mr. JONES. We have gotten one law and it is uniform, but it is not completely satisfactory. We hope the future will see more uniformity in this area.

Mr. Moss. That was probably more from a State that was atypical in the insurance field than typical.

Mr. JONES. That is why, Mr. Chairman, they did it first because they had the worst situation.

Mr. Moss. Thank you very much. At the conclusion of your statement, I said I regard it as a very constructive statement and of value to us. I wish all of the statements given today could be viewed by us in the same category but, unfortunately, we cannot so view all of them.

Mr. JONES. We have tried to be of help to you.

Mr. Moss. Thank you.

The committee is adjourned until 10 o'clock tomorrow morning.

(The subcommittee adjourned at 5:05 p.m., to reconvene at 10 a.m., Friday, April 30, 1971.)

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